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NOTES OF INDIAN CASES.

DADACHANJI *v.* RATANBAI, I. L. R. 49 Bom. 167 : 47 M. L. J. 850 (P. C.)

In this case, a Parsi by his will directed his executor to maintain himself and the testator's son and to defray the expenses of educating the son out of the testator's property and effects and to make over the remaining property to the son on his attaining majority and the question was whether the bequest to the son created a vested interest in him which would descend to his heirs even if he died before attaining majority or only a contingent interest. The provision of law that their Lordships had to consider was the exception to S. 107 of the Succession Act which had been extended to the Parsis. This section and the exception thereto have been made applicable to the Hindus, Jains and Sikhs governed by the Hindu Wills Act. The question will naturally require consideration whether if a similar point were to arise in the case of the will of a Hindu not governed by the Hindu Wills Act if there are any rules to guide us. It is too much to expect the ancient Hindu Law to have anything to say on such complex provisions in wills or settlements ; and all that can be said is that there is nothing in it to discountenance such dispositions. The English law on this subject is highly technical and in some respects there is a conflict of judicial opinion. The principle underlying the English decisions on this branch of law has been stated by Page Wood, V. C. in *Pearson* v. *Dolman* (1) as being that " where the principal is given at a distant epoch and the *whole income* is given in the meantime, the Court leaning in favour of vesting has said that the whole thing is given." In the case before their Lordships, even assuming every other condition to be present, it was not the income of the property bequeathed, much less the whole of it that was

1. (1866) 3 Eq. Cases 315 at 321.

given for the maintenance or benefit of the legatee. Again, where any portion of the income is applicable to any purpose which is not for the benefit of the legatee it is well settled that the legatee does not get a vested interest in the legacy but only contingent on his attaining the age ; and reference has been made by their Lordships to *Gossling In re, Gossling* v. *Elcock* (2) in this connection.

We are not sure whether too much emphasis can be laid in the decision of this case on the circumstance that the property which will vest in the son in possession on his attaining majority could not be predicated or ascertained earlier, as the same consideration may be said to exist in many cases of the dispositions of residuary estate, and the rule under consideration has been said to be applicable *a fortiori* to bequests of the residue. Cf. *Usher In re, Foster* v. *Usher* (3).

It may perhaps be not out of place here to refer to some points of comparison that may be suggested between the English rule and the exception to S. 107 of the Succession Act. In the first place, in England the rule gives rise only to a presumption of vesting which may be rebutted. *See* 28 Halsbury, 815. Here, the exception would seem to enact a rule of law. On the question where a trustee or executor is directed to apply so much of the income as he may consider necessary for the maintenance or education of the legatee and the balance of income and the legacy are given to the legatee on attaining a particular age, the English law is by no means settled whether the legacy is vested or contingent. See *Usher In re, Foster* v. *Usher* (3) where the prior cases are reviewed and the conflict of decisions pointed out. The exception to S. 107 would seem to adopt the view of Jessel, M. R. in *Fox* v. *Fox* (4) that the gift of so much of the interim income as may be necessary to be applied for the benefit of the legatee would render the legacy vested. Again a mere provision for maintenance out of the income to the legatee has been held in England not to make the legacy a vested legacy. *Watson* v. *Hayes* (5). It is doubtful whether this is the necessary effect of the exception to S. 107.

In this state of English authorities and especially having regard to the caution which has been frequently urged by their Lordships of the Privy Council against importing into this country the English rules of construction of wills in

2. (1902) 1 Ch 945.
3. (1922) 2 Ch 321 at 326.
4. (1875) 19 Eq Cases 286.
5. 5 Myl and Cr. 125 at 133.

Norendra Nath Sircar v. *Kamal Basini Dasi* (6) and in later cases it may be suggested that though S. 107 and the exception thereto may not in terms apply to moffusal wills outside Bengal and outside the cities of Bombay and Madras, they may be adopted as embodying the principles guiding the construction of Hindu wills not governed by the Hindu Wills Act. It cannot, however, be said that even if we adopt this rule, we shall not have to resort to English decisions in some respects for our guidance. *See* Trevelyan's Hindu Wills, p. 111 (2nd edition). Reference may be made in this connection to S. 21 of the Transfer of Property Act and the exception thereto applicable to other transfers though they are not to affect rules of Hindu law to the contrary, if any.

COLE *v.* NANALAL MORARJI, I. L. R. 49 Bom. 172.

This decision of the Bombay High Court points clearly to the distinctive characteristic of a hire purchase agreement, the nature of which is perfectly well understood in England but whose imperfect understanding has resulted in what the parties apparently wanted to express as a hire purchase agreement having failed in its purpose and having been construed as a sale with an agreement as to payment of the price in instalments. The circumstance that marks out a hire purchase agreement from an agreement to sell or to purchase or a sale is that there is only an option in the hirer to take a purchase of the thing hired and no obligation on his part to pay the price or to buy the article. The question of the nature of the contract being one depending on its construction, it is purely one for the Court on a consideration of the rights and obligations of the parties having regard to the whole of the agreement, and it is not open to parties to escape the consequences of an agreement to sell by merely calling it a hire purchase agreement. Cf. *Helby* v. *Matthew* (1). Consequently where the parties impose on the hirer the obligation to keep the article for the whole period which will convert him to an owner and to pay the entire rent which would be equal to the price, the nature of the contract is really one of an agreement to sell the thing. If, however, on the other hand, the agreement obliges the hirer to keep the thing and pay the hire for a period which is not the full period to convert him into an owner and gives him the option to return it after the period, the agreement would only be one for a hire purchase. *Belsize Motor Supply*

1. (1895) A C 471 at 475. 6. (1896) I L R 23 C 563 (P. C.)

Company v. *Cox* (2). The distinction between the two classes of cases has frequently become material in cases where the hirer has pledged and sold the article to a stranger who takes it in good faith without knowledge of the agreement and the question has arisen whether the owner can recover it from the stranger pledgee or purchaser. Where the nature of the original transaction is merely a hire purchase agreement, the hirer not having had juridical possession of the article any vendee or pledgee from him cannot keep it as against the owner. See *Leon Saubolle* v. *K. V. Seyne and Bros.* (3). On the question of damages recoverable in such a case by the owner from such stranger, although the ordinary rule is the full value of the thing detained or converted, it has been held by the Court of Appeal that where there has not been any repudiation of bailment, the owner cannot recover more than the balance of the amount payable under the agreement if the vendee or pledgee is willing to pay it duly. *Whiteley* v. *Hilt* (4). If, however, the transaction amounts to a sale or an agreement to sell under which the property has passed to the buyer, the original owner cannot recover as against the buyer or pledgee ; and this is what happened in the case under notice.

MANJAYA *v.* SESHAGIRI, I. L. R. 49 Bom. 187.

That a surrender by a Hindu widow to operate as such and accelerate the estate of the reversioners must be to the entire body of the next presumptive reversioners and not merely to some of them is well settled after the decision of the Privy Council in *Rangasami Goundan* v. *Nachiappa Goundan* (5). Even before that decision, the Bombay High Court acted upon this rule in *Dodbasappa Ramlingappa* v. *Basawanappa* (6). In spite of the fullness with which the subject has been discussed in *Rangasami Goundan* v. *Nachiappa Goundan* (5) the exposition by their Lordships of the theory of surrender by a Hindu widow is by no means cogent in all its particulars. This has been fully discussed in a leading article "Adoptions and Alienations by Hindu Widows" (7) to which reference may be made in this connection.

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2. (1914) 1 K B 244 at 251.
3. (1918) 23 C W N 552. 4. (1918) 2 K B 808.
5. (1918) I L R 42 M 523 : 36 M L J 493 (P. C.).
6. (1918) I L R 42 B 719. 7. (1919) 36 M L J 55 (Jour.)

BARENDRA KUMAR GHOSE *v.* EMPEROR, I L R 52 Cal. 197 : 48 M L J 543 (P. C.).

This decision of their Lordships will hereafter be looked upon as the most authoritative exposition of S. 34 of the Indian Penal Code and as settling the conflict of judicial opinion that has existed on its construction. Although in the construction adopted by their Lordships, cases falling under Ss. 149 and 114 of the Code may in some instances overlap in their application S. 34, any other construction of this latter section would render its enactment useless as a mere statement of a platitude.

The case under notice is also useful as indicating their Lordships' view on cl. 41 of the Letters Patent of the Calcutta High Court although they do not give their decision on the question. Notwithstanding the loose expressions often used by the Privy Council that they are not a Court of Criminal Appeal, that it is not their constitutional position in criminal matters and that it is outside their jurisdiction to entertain criminal appeals in some instances, vide *Clifford* v. *King-Emperor* (1), *Muruga Goundan* v. *King-Emperor* (2), *Bugga* v. *The King-Emperor* (3) and *Rustom* v. *King-Emperor* (4), " the question is not one of jurisdiction. The power of His Majesty under his Royal authority to review proceedings of a criminal nature, unless such power and authority have been parted with by statute is undoubted." *Arnold* v. *King-Emperor* (5). Again as observed by Lord Haldane in *Rustom* v. *King-Emperor* (6), there is a constitutional right of appeal even in criminal matters to the King-Emperor. What is more important is that in the class of cases falling within the terms of clause 41 of the Letters Patent, the Privy Council is expressly constituted a Court of Criminal Appeal. But the Privy Council does not interfere with the decisions of the lower Courts in criminal cases in the exercise of the appellate powers except under the circumstances mentioned in *In re, Dillet* (7), *i. e.*, when the rules of natural justice have been violated and grave injustice has been done. The case of civil appeals to the Privy Council where their Lordships do not ordinarily interfere with the concurrent findings on facts, although the Privy Council is undoubtedly a court of

1. (1913) I L R 41 C 568 (P C). 2. (1921) 14 L W 558 (P C).
3. (1919) M W N 748 (P C) 4. (1923) I L R 48 B 515 (P C).
5. (1914) I L R 41 C 1023 at 1065, 1066 (P C).
6. (1923) I L R 48 B 515 at 517 (P C). 7. (1887) L R 12 A C 459.

appeal bears some analogy in this connection. The correct position of the Privy Council in criminal matters has been stated by the Calcutta High Court in this very case when it was before it in *Barendra Kumar Ghose* v. *The King-Emperor* (8) where all the cases have been referred to and considered.

It has, however, to be mentioned that, in this case, the Calcutta High Court lost sight of the fact that the appeal was not one from the decision of the High Court on its original criminal jurisdiction or where points have been reserved as under clause 25 of the Letters Patent by the Judge exercising the original criminal jurisdiction. We are not sure whether the learned Judges considered the jurisdiction exercised in the case as being original criminal, as it was in the nature of a review of a decision on the original criminal side. But no arguments on this head appear to have been advanced before the High Court. In *Reg* v. *Reay* (9), Sir Michael Westropp, C. J., sitting with Gibbs and Melville, JJ. was of opinion that an appeal would lie to the Privy Council in criminal matters even in cases where the High Court reviews a decision of the High Court in exercise of the original criminal jurisdiction under a certificate of the Advocate-General. The attention of their Lordships of the Privy Council does not seem to have been directed to this case, although on the language of the clause of the Letters Patent there is much to be said in favour of the contention of the respondent before the Privy Council.

It is difficult to appreciate the hyper-criticism of their Lordships on the expression "leave to appeal" at p. 219 in the case under notice as applied to appeals to the Privy Council, especially in view of R. 2 of the Judicial Committee Rules of 1908 which has been repeated in the new rules of 1925, which provides that all appeals shall be brought in pursuance of leave obtained from the Court appealed from or in the absence of such leave, in pursuance of special leave to appeal by the Privy Council. Although Art. 41 of the Letters Patent is silent as to the conditions under which leave to appeal will be granted in criminal cases, the object of the appeal being the interference by His Majesty in Council with the decision of the Subordinate Court on a criminal matter, it will only be granted in cases

8. (1923) 28 C W N 377. 9. (1870) 7 Bom. H C R (Cr.) 77.

where there is a *prima facie* case answering to the conditions referred to in *Dillet's case* (7). See *Bal Gangadhar Tilak, In re* (10), and *Barendra Kumar Ghose* v. *The King-Emperor* (8).

RAGHAVENDRA GURU RAO *v.* MAHIPAT KRISHNA, I L R 49 Bom. 202.

It has been held in this case that when a surety keeps alive his liability by an acknowledgment or otherwise and pays the guaranteed debt to the creditor, he can recover the amount from the principal debtor although at the date of the payment the rights of the creditor against the principal debtor might have been barred by limitation. It can hardly be doubted that if the surety's liability as well as the principal debtor's liability was barred at the date of the payment by the surety, it would have been purely voluntary and the surety cannot recover the amount against the principal debtor. *In re, Morris : Coneys* v. *Morris* (1). It must, however, be admitted that even in this latter case, the payment by the surety of a barred debt would not be "wrongful" to use the expression in S. 145 of the Contract Act, which was considered by the learned Judges of the Bombay High Court; and there is statutory recognition in S. 60 of the Act that a barred debt is none the less lawfully due from the debtor. Construing the section in the light of the illustrations to it, the words "rightfully" and "wrongfully" in S. 145 do not bring out clearly the intention of the section which seems to be that in some cases the principal debtor may be liable to pay the surety a larger sum than the amount of the primary liability as where the surety has incurred costs in reasonably defending *bona fide* an action by the creditor. *Cf.* also S. 125.

It has been said that where a surety is compelled to pay to the creditor, he recovers it from the principal as money paid for his use and the form of the pleading in the action is for money paid by the plaintiff for the debtor at his request, express or implied. *In re, Morris : Coneys* v. *Morris* (2). But it may well be doubted if the implication of the request to pay by the debtor can be raised in cases where his liability to the

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7. (1887) L R 12 A C 459. 8. (1923) 28 C W N 377.
10. (1908) I L R 33 B 221.
1. (1922) 1 I R 81 and 136. 2. (1922) 1 I R 81 at 83.

creditor is statute-barred. There is authority in support of the view that as between co-debtors, when the liability of one of them is kept alive by part payment of the debt to the creditor and he discharges the liability in full at a time when the liability of the others is statute barred, he can nevertheless recover the excess over his share of the debt from his co-debtors, under their implied duty to contribute or indemnify. *Gardner* v. *Brooke* (3). The principle of this decision would seem to support the decision of the learned Judges in the case under notice.

There is, however, one argument against the decision which may be noticed here but which has not been dealt with there. It has been well settled in Equity that it is open to the surety even before payment by him of the guaranteed debt to call upon the principal debtor to exonerate him from the liability after the debt has accrued due and become payable and he can even call upon the principal debtor to set apart a sum to answer the liability. *Wooldridge* v *Norris* (3) and *Lacey* v. *Hill* : *Crawley's claim* (5). This principle has been recognised and acted on by the Privy Council in appeal from the Straits Settlements in *Eastern Shipping Company, Limited* v. *Quah Beng Kee* (6). If then the surety has his right of action against the principal debtor immediately as the original debt accrued due or at any rate when the demand is made on him by the creditor he cannot unduly prolong the time for suing the principal debtor by making the payment out of time and claiming on it against the principal. This argument seems to meet with the approval of De Collyar in his well-known book on Guarantee, 3rd edition, pp. 311, 312. It is also noticed by Powell, J. in the Court of Chancery in the case of *In re, Morris* : *Coneys* v. *Morris* (1) above referred to; but the learned Judge has not given his decision on the point. We may perhaps venture to submit that when the surety sustains damage by being compelled to pay, it gives rise to a fresh cause of action against the principal debtor on the payment although it was made at a time when the principal debtor's liability to the creditor was barred. Cf. *Wolmers Hausen* v. *Gullick* (7) and *Gardner* v. *Brooke* (3).

1. (1922) 1 I R 81.
3. (1897) 2 I R 6.
4. (1868) L R 6 Eq Cases 410.
5. (1874) L R 18 Eq Cases 182.
6. (1924) 34 M L T 90 (P C).
7. (1893) 2 Ch 514

BARADA KANTA SAHA ROY *v.* SHEIKH MAIJUDDI, I L R 52 Cal. 275.

The judgments of the learned Judges composing the Full Bench in this case have brought out fully the anamolies that exist in the Code of Civil Procedure of 1908 as regards the powers of the Provincial Small Causes Courts to effect an attachment before judgment of immovable properties. The majority of the Full Bench have held that there is the power in the Small Causes Court to order an attachment of immovable property before judgment but that the attachment has to be effected by an ordinary Civil Court and that all claims to the attached property have to be investigated by the latter Court. The view of the other Judges forming the minority has the effect of negativing the power of the Provincial Small Causes Courts to attach even movable properties before judgment which power they undoubtedly possessed under the prior Code of 1882, a result which could hardly have been intended by the Legislature. We, however, venture to doubt whether an order of attachment has really got to be " executed " with all the formalities prescribed by O. 21 of the Code, as for instance by putting an application for execution in the manner provided by O. 21, R. 11. It is not every order which is given effect to in the course of a suit or otherwise which requires to be executed under S. 36 of the Code. Cf. *Parvathammal* v. *Chokkalinga Chetty* (1). We doubt whether the section has not reference only to executable orders in the strict sense of the term, like orders for costs, etc. It is therefore not easy to see why the Small Causes Court may not itself attach the immovable property after ordering its attachment and investigate summarily the claims regarding the same. Incidental investigations into the titles to immovable properties or rights to the same are not altogether beyond their powers. *Cf.* S. 23 of the Provincial Small Causes Courts Act under which it is optional for Small Causes Courts to try incidentally questions of title to immovable properties. We doubt therefore whether after an order for an attachment of immovable properties is made by the Small Causes Court, it should go to an ordinary Civil Court for effecting the attachment. *Cf.* 20 C. W. N. 178 (Journal). Whatever may be the correct view on this point, the question is one which ought to engage the early attention of the legislature as

1. (1917) I L R 41 M 241.

the matter is of frequent occurrence, especially as it cannot be remedied by the High Courts under their rule-making power. The question came up recently before the Madras High Court in *Kothandarama Chetty* v. *Annamalai Pillai* (2) where the learned Judges held that a Provincial Small Causes Court has power to attach immovable properties before judgment under the Code of Civil Procedure of 1908, and no distinction has been made between the power to order an attachment before judgment and the power to effect the attachment, apparently because no such distinction was sought to be made. It is significant that the attention of the learned Judges in the Madras case was not drawn to *Sadek Ali* v. *Samed Ali* (3) or to the Full Bench decision under notice which had been reported in 28 C. W. N. 1056 ; and the authority of the case in *Kothandarama Chettiar* v. *Annamalai Pillai* (2) is, we apprehend, distinctly weaker for this omission.

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2. (1924) 48 M L J 406.

3. (1923) 28 C W N 16.

MANZUR HASAN *v.* MUHAMMAD ZAMAN, I. L. R. 47 All. 151 : 48 M. L. J. 23 (P. C.).

Their Lordships of the Privy Council laid down in this case that the " distinction between indictment and an action in regard to what is done on a highway is a distinction peculiar to English law and ought not to be applied to India"—thus overruling the cases in India that held that an action would not lie in the absence of special damage. Their Lordships further decide that "in India there is a right to conduct religious processions with appropriate observances along a highway provided the ordinary use of such highway by the public is not interfered with and subject to such directions as the magistrates may lawfully give to prevent obstructions of the thoroughfare or breaches of public peace, " and that worshippers in a mosque or temple which abutted on the high road could not compel the processionists to intermit their worship while passing the mosque or temple on the ground that there was continuous worship there. Their Lordships' judgment on the one hand repels the pretension of every sect or religion when places of worship are upon the route where the processions of those with whom they do not agree pass to insist upon the functions of the procession ceasing ; on the other they recognise the right of magistrates to make any arrangement they choose and if they choose to forbid the doing of ***matam*** or the peculiar pauses with wailing of a Shiah mohuram procession within a certain distance of the Sunni mosque, only as a special case and not as a general rule.

This is a subject on which there has been considerable divergence of judicial opinion and some Judges were so impressed with the disastrous consequences of the recognition of a general right like that admitted in this case that they questioned the legal right to take processions on a public highway. (*See* 26 M. 554.) Their Lordships had already shown a strong indication of their inclination in *Sadagopachariar* v. *Rama Rao* (1).

FATEH SINGH *v.* JAGANNATH BAKHSH, I. L. R. 47 All. 158 : 48 M. L. J. 64 (P. C.)

The point in this case was one of *res judicata.* First a suit was brought by a person claiming to be a reversioner to set aside certain alienations.

1. (1902) I L R 26 M 376.

Pending suit the widow died. Plaintiff was not the next reversioner though he alleged he was and so under the ordinary Hindu Law his suit would have had to be dismissed. He might have brought his suit for declaration to a hearing as their Lordships say for the purpose of determining in that suit the question of heirship as between himself and the rival claimant or to establish his averment of collusion between the rival claimant and the widow so as to get his costs of the suit. But neither course was regarded hopeful by the plaintiff and he put in an application to amend the plaint so as to contain averments of family custom which would exclude the rival claimant and let in the plaintiff. The Judge would not allow the amendment as it introduced a new case but dismissed the suit with a rider that the death of the lady had given the plaintiff a new cause of action for possession and that he gave him liberty of filing a fresh suit for possession.

Notwithstanding the rider, their Lordships held that the fresh suit for possession on the averment of family custom was barred by the principle of *res judicata*. Their Lordships held that the plaintiff " might and ought to have made the allegation of custom in the previous suit" and was therefore barred. "To prove his nearness of kin, it was essential to him to aver the family custom. He claimed as next heir and his claim was dismissed. He cannot fight it over again." Their Lordships hold that the reservation was *ultra vires* of the Judge and the dismissal barred the suit. The case of *Parshotam Gir* v. *Narbada Gir* (1) which bore a certain analogy to the facts of this case was not cited and we have not accordingly the benefit of their Lordships' explanation of that case. The point of distinction between that case and this is that whereas in that case there was a refusal to adjudicate any point ; in this there was a complete adjudication on the facts so far as the Court thought was properly adjudicable in the case. Their Lordships hold that after the dismissal of the suit on the merits, the reservation was *ultra vires* and of no effect whatsoever.

SUBHADRAYAMMA *v.* VENKATAPATHI, I. L. R. 48 M. 230 : 47 M. L. J. 93 (P. C.).

Pending a suit, an agreement was entered into with one of the plaintiffs therein and the present plaintiff's husband that

1. (1899) L R 26 I A 175.

the former should advance moneys for the litigation up to a certain amount, that he should get it out of the property when recovered, that there should be no compromise without his consent and the consent of a particular vakil,that his money should come out of the property that might be so got by compromise, that the defendant should account for the moneys taken with vouchers, etc. Plaintiff's husband advanced certain amount and on his refusing to advance further amounts without vouchers, defendant gave notice repudiating his obligation under the contract and proposing to make his own arrangements. He compromised the suit and got some money as a result. Neither the plaintiff's husband nor the vakil were consenting parties to the arrangement both being dead at the time plaintiff claimed a charge on the amount got. Her claim was rejected in the High Court on the ground

(i) that the compromise was not the compromise in contemplation of the parties and as such the case did not come within the express terms of the contract ;

(ii) that the contract related to non-existent property and as both parties had repudiated their obligation under the contract it was at an end and further being in the circumstances incapable of specific performance the charge could not fasten itself on the property got by the compromise.

On appeal, the Privy Council held reversing the judgment of the High Court that the proper construction of the compromise was that the consent of the plaintiff's husband and the vakil mentioned was necessary only so long as they lived and having regard to the surrounding circumstances and the absurdity to which the contrary conclusion would lead, such an implied term should be inferred.

(ii) As regards the second point, their Lordships dissent from the view that a contract in respect of the subject-matter of litigation like the one in question relating to the Zemindari of Vizianagram was not one relating to non-existent property although the title to it might be in dispute. They further hold that even in the view that the contract related to non-existent property the party in default was the defendant who declined to give vouchers and the contract had not been terminated by the plaintiff or her husband. In 16 M. 429 a charge such as the present was thought to be analogous to charge on non-existing chattels or debts. In view of this decision, that view

is no longer sustainable. Champerty and maintenance not being illegal in India, there was no objection to such an arrangement and the charge was perfectly valid from the very beginning.

HIRA LAL GHOSE *v.* EMPEROR, I. L. R. 52 Cal. 159.

The learned Judges have held in this case in accordance with the weight of authority on the question that the provisions of S. 360 of the Criminal Procedure Code are mandatory and that the non-observance of the requisites of that section as to the manner of taking and recording the evidence in criminal cases is fatal to the trial and that an accused person cannot be convicted on evidence improperly taken or recorded. In this connection it may be mentioned that the mandatory nature of a provision of law does not necessarily lead to the result that its non-observance nullifies or vitiates altogether the proceedings where it has been disregarded. This was clearly pointed out by the Privy Council in *Walian* v. *Banke Behari Pershad Singh* (1) in considering the effect of non-observance of the provisions of the Code of Civil Procedure regarding minors on the decrees obtained in those suits and their Lordships held that although those provisions of law were imperative in their nature, their non-observance did not vitiate or nullify the proceedings altogether. Having regard to the object of S. 360, which is intended to protect the witnesses and the accused in the case and to prepare an accurate record of the evidence in the case, the learned Judges have come to the conclusion that a non-compliance of the requirements of the section vitiates the trial altogether and renders the conviction and sentence based thereon illegal. Although this may not be the only conclusion possible, there can be no doubt that this is the safer conclusion in the interests of public justice and the accused. A distinction has to be drawn between basing a judgment on evidence which has not been recorded in accordance with the provisions of S. 360 of the Code and using such a deposition in a trial of the witness for perjury as to which reference may be made to our comments on *Emperor* v. *Nabab Ali Sarkar* (2) of 47 M. L. J. (N. I. C.) 65-67.

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1. (1903) I L R 30 C 1021 at 1031 (P C). 2. (1924) I L R 51 C 236.

MAHARAJA OF KOLHAPUR *v.* SUNDARAM AIYAR, I L R 48 M 1.

The legal interest of this—otherwise known as the Tanjore Palace case—is hardly commensurate with its importance, pecuniarily, socially or even historically.

One question of importance in this case was as to the caste of the Tanjore Rajas, involving as it did, incidentally, the question as to the caste to which the royal families of Kolhapur, Satara and the famous Sivaji belonged. On the finding of the learned Judges that Raja Serfoji was descended from an illegitimate descendant of Venkaji, the brother of Sivaji the Great, the caste of Sivaji became a question of secondary importance.

Even assuming that the Tanjore Rajas were legitimate descendants, there was no evidence of their either being Kshattriyas to start with or evidence of consistent assumption of Kshattriya custom or rules. On that finding, their Lordships could not help coming to the conclusion that they were Sudras. The general rule, no doubt, is that a man's caste is that in which he is born and he cannot raise his caste and also that if a man is unable to show that he is of a twice-born caste, he must be a Sudra. But it cannot be that it is open to any party to go back notwithstanding uniform course of conduct over centuries showing the assumption of twice-born customs and rules of the twice born classes or for the matter of that, even uniform assertion of the twice-born caste, and try to prove that the pretensions are not justified and that in its origin, the family was of a lower caste. Hindu Law being largely custom and having regard to the place it allows to family customs such a course, we should think, would be wholly unwarranted; the more so, we think, when the question relates to rules that should govern royal families. Whatever the theory of ancient Hindu Law, the modern theory of sovereignty must concede to ancient kings' plenary jurisdiction to interfere with social and legal rules and when a deliberate departure from ancient customs followed up by subsequent conduct is found, Courts are bound to give effect to such departure. The process of absorption into either the Hindu fold or the Hindu castes has not yet stopped and the scheme of castes has not yet become a wholly cast-iron affair notwithstanding the contribution of Courts to that result.

N I C

The main legal questions in the case were (i) as to the construction of a grant by the Crown, (ii) as to the validity of an adoption by the widow of the late Raja of Tanjore, (iii) as to the validity of what was called a sword marriage, (iv) as to the method of distribution of the property between the illegitimate son and the adopted son of a Sudra.

The East India Company had, by an Act of State, taken possession of the estates of the deceased Raja and subsequently recognising the injustice of the course, restored it to the widows with a clause that the widows should enjoy—after them, the daughter—failing daughter, the next heirs of the Raja. The question was—What estate was conferred on the daughter and who the term "next heirs" included, whether it applied only to people coming after the widow and daughter in the line of succession or whether it would include the adopted son who would have, in ordinary circumstances, taken before the widow. Their Lordships held that the daughter was intended only to take an estate contingent on her surviving the widow and that the intention as regards further devolution was that the heirs inclusive of the adopted son should take provided he was the nearest.

On the evidence of custom adduced in the case their Lordships hold that the status of sword wives was only that of permanently kept concubines. Manu provides that in the case of marriages between a Brahmin and a Kshattriya woman, the woman should hold an arrow. Sword marriages at the best must connote an alliance between a man of higher caste with a woman of lower caste. Marriage with equals according to Manu is to be by the holding of hands.

As regards the mode of distribution of the property, the argument seems to have been that in applying the rule recently laid down by the Privy Council, a distinction ought to be made between an adopted son and a natural son, that first the illegitimate sons should be assumed to be legitimate, and their shares determined on that basis, and the balance should be given to the adopted son. Their Lordships repelled this contention, we think rightly, holding that except in specified cases, the adopted son stood on exactly the same footing as an aurasa and in the calculation of shares, the adopted son should be treated exactly as if he were an aurasa. The result was that in this case where there were six illegitimate

sons and one adopted son, the illegitimate sons got 3|7th and the adopted son 4|7th. Following *Ramalinga Muppan* v. *Pavadai Goundan* (1). Their Lordships applied the principle of representation to legitimate sons of illegitimate sons and gave them the shares of their fathers.

The two points of interest that arose with respect to adoption were : (i) whether an adoption with the consent of the mother-in-law in the absence of other sapindas was good ; (ii) whether an adoption can take place after the property of the husband is lost by confiscation. On both the questions their Lordships held in favour of the validity of the adoption.

As regards the first point it is rather curious that the "presumed incapacity of women to act" independently should be made up by the consent of one similarly situated but the Ramnad case itself recognises the efficacy of such a consent.

On the second point their Lordships refuse to extend the various restrictions imposed on the widow's power of adoption on the ground of the vesting of the property in somebody else to a case like the present—rightly, we think. The practical difficulties in the application of the restrictions are endless and it is unwise to extend them. Much responsibility rests on the shoulders of English Courts in this matter.

One or two minor points of evidence that arose also are worth noting.

First, whether the deposition of a witness who died before his cross-examination could be used. Their Lordships hold, in accordance with English precedents, that it could be —the absence of cross-examination going only to the weight to be attached to such a deposition. Another point was about the admissibility of the judgments in previous litigations relating to the caste of the family ; both the learned Judges hold that they are admissible and Mr. Justice Kumaraswami Sastri goes further and holds that the evidence of witnesses recited in the judgment is also evidence when the depositions themselves are not available.

VENKATADRI APPA RAO *v.* PARTHASARATHI APPA RAO, I. L. R. 48 M. 312 : 48 M. L. J. 627 (P. C).

Two questions arose in this case : (i) as to the power of disposition of a widow over the income of her estate when

1. (1901) I L R 25 M 519 : 11 M L J 399.

there was nothing to show how she wanted to deal with it during her life-time ; and (ii) as to the article of limitation applicable to the case and the starting point.

Here the mother, holding for a life-estate the property of her son which was in the custody of a Receiver pending litigation started by her to establish her title to it on the footing that his adoption was bad and she, as mother, was entitled to it, disposed of by will the income of the estate accrued during her lifetime and the suit was by the legatees to recover the legacies from the heir in possession. On the first point their Lordships must be taken to approve of the course of decisions in Madras that in the absence of evidence of any intention to make it an accretion to the estate, she had the right to dispose of it. On the second point, their Lordships hold that Art. 123 applied to the case although the defendant was not the executor or administrator legally authorised to act and as to the starting point hold on the construction of the will, having special regard to the surrounding circumstances, that the legacy was "payable or deliverable" only after the final determination of the suit in the Privy Council. Their Lordships further hold apparently as a point of general law that the legacy can be said to be payable or deliverable only when the heir or executor has funds in his possession from which the legacies are payable. Their Lordships further seem to approve of the rule of benignant construction of the articles of limitation like Art. 97, 123, when the claim depends on the termination of litigation which takes such termination as the starting point. It is really this rule of benignant construction that is the justification for cases like *Muthu Korakkai Chetty* v. *Madar Ammal*(1) which was a case under Art. 180 of the Limitation Act.

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1. (1919) I L R 43 M 185 : 38 M L J 1 (F B).

PALANI AMMAL *v.* MUTHU VENKATACHALA MONIAGARAR, I. L. R. 48 M. 254 : 48 M. L. J. 83 (P. C.).

On some of the recent rulings of the Privy Council, in connection with partition, a regular tangle of decisions has arisen and this decision serves to remove some amount of it. First, what is the effect of the admitted severance of one member ? Does it involve the severance of the other members also *inter se* ? If it does, does it go so far as to sever not only the branches but also members of the various branches *inter se* ? If any members say that they continued united—have they got to prove an agreement to that effect ? The doubt arose from the following—one cannot fail to regard as a somewhat unhappy language of the Privy Council in *Balabux* v. *Rukhmabai* (1) : "It appears to their Lordships that there is no presumption when one co-parcener separates from the others, that the latter remain united. In many cases, it may be necessary, in order to ascertain the share of the outgoing member, to fix the shares which the other co-parceners are or would be entitled to, and in this sense the separation of one is said to be a virtual separation of all. And their Lordships think that an agreement amongst the remaining members of a joint family to remain united or to re-unite must be proved like any other fact." In *Hari Baksh* v. *Babu Lal* (2) their Lordships held that partition between two brothers does not, by implication of law, cause a severance between the brothers and their sons *inter se*. Even as regards brothers, Mr. Justice Kumaraswami Sastri vigorously combated the view that the severance of one gives rise to any such implication. Said his Lordship : "If the suit is one for general partition (in which case it is necessary to determine the shares of all the members and to grant reliefs to all of them) and the decree declares the shares of all the members in the items of family property, there will be a severance of status and if others, in spite of the decree, continue to remain joint, it can only be under an agreement express or implied to reunite. But, where from the scope of plaint or pleadings all that appears is that one member of an undivided family wanted to cut himself off from the rest and the other members neither asked nor evinced a desire for partition *inter se*, the consideration of the shares of the others is only incidental for the purpose of giving the relief which the plaintiff wants (as it is not possible to arrive at the share of one co-parcener without knowing how many co-parceners there are

1. (1903) I L R 30 C 725 at 736 (P C).
2. (1924) I L R 5 Lah 92 : 47 M L J 938.

and their shares) and the status of the others is unaffected by the decree in favour of one member." Their Lordships seem to approve of the view of Mr. Justice Kumaraswami Sastri.

Thus their Lordships say: "The mere fact that the shares of the co-parceners have been ascertained does not by itself necessarily lead to an inference that the family had separated. There may be reasons other than a contemplated immediate separation for ascertaining what the shares of the co-parceners on a separation would be. It is also now beyond doubt that the remaining co-parceners, without any special agreement amongst themselves, may continue to be co-parceners." "That the remaining members continued as joint family may be inferred from the way in which the family business was carried on after their previous co-parceners had separated from them." Their Lordships take *Balabux* v. v. *Rukhmabai* (1) as leading authority for the proposition that re-union, if set up, being of rare occurrence has to be strictly proved. So goes one great source of confusion and trouble.

Another trouble with Courts has been to decide what constitutes an unequivocal declaration of intention to divide which, according to the Privy Council, is sufficient to effect a severance.

In *Girja Bai* v. *Sadashiv Dhundiraj* (3) a notice demanding partition accompanied by a suit was held sufficient. In *Kawal Nain* v. *Budh Singh* (4) a withdrawn suit was held sufficient. In the case under review, there was a suit for partition on the footing of a will but that was found invalid and the first Court made a decree for division according to Patnibhagam. There was an appeal from its decision to the Sudder Court. Pending the appeal to the Sudder Court some of the parties compromised by which they agreed not to press the claim for partition but took maintenance with a view to leave the property intact in the hands of the senior line. The Sudder Adalat reversed the judgment of the Lower Court on the question of the Patnibhaga, but felt itself not called upon to divide the estate according to law and left it to parties if discontented with the management of the *head* to sue for partition. The property continued in the hands of the senior branch. The question was as to whether the family had become separated. Their Lordships hold, agreeing with the High Court, that it had not become separated by reason of the proceedings. This is how their Lordships explain the previous decisions. "The fact that any member of a joint family has separated himself

1. (1903) I L R 30 C 725 (P C).

3. (1916) I L R 43 C 1031 : 31 M L J 455 (P C).

4. (1917) I L R 39 A 496 : 33 M L J 42 (P C).

from his co-parceners may be proved by his suing for partition of the joint family property and if the suit is decreed the date of his severance from the joint family will, if nothing else is proved, be treated as the date when the suit was instituted. In *Kedarnath* v. *Ratan Singh* (5) a member of a joint Hindu family had filed a plaint claiming a partition but afterwards had withdrawn it and the Board held that no severance of joint status resulted. Their Lordships see no reason to depart from that view although such a plaint, if withdrawn would, unless explained, afford evidence that an intention to separate had been entertained [*Girja Bai* v. *Sadashiv Dhundiraj* (3) and *Kawal Nain* v. *Budh Singh* (4).]. No effective decree can be made for a partition unless all the co-parceners whose addresses are known are made parties to the suit. In the case under review, there was that defect in the proceedings relied upon. This case illustrates the difficulty in carrying out consistently the theory of separation by unilateral declaration. *Kedarnath* v. *Ratan Singh* (5) was before the new theory and is naturally inconsistent with the later decisions in which that case was not noticed. As a result, we have an attempt at reconciliation which is hardly satisfactory. Both the contradictory decisions and the explanation are by their Lordships and the latest decision will naturally govern.

MAINA BIBI *v.* CHAUDHRI VAKIL AHMAD, I. L. R., 47 All. 250: 48 M L J 667. (P. C.).

The point in this case was one of *res. judicata*. The plaintiff, a Muhammadan, had sued previously for his share of his ancestor's estate and got a decree for the same on condition of his paying the dower debt due to the widow (defendant) within a specified time. He had failed to comply with the condition and his suit stood dismissed. The question was whether that judgment precluded him from suing again some years after on the footing that the widow had parted with possession and as such had forfeited her right to retain possession entitling him to an unconditional decree for possession of his share, in the alternative, on payment of the amount found due to her on taking accounts in respect of profits accrued since the date of the previous decree. The argument was that the position of the widow was analogous to that of a usufructuary mortgagee and just as a second suit for redemption would not lie, a second suit for recovery of the property held by the widow in lieu of dower also would not lie. Their

3. (1916) I L R 43 C 1031 : 31 M L J 455 (P C).
4. (1917) I L R 39 A 496 : 33 M L J 42 (P C).
5. (1910) I L R 32 A 415 : ~~20 M L~~ J 900 (P C).

Lordships reject the argument as one based on a wholly false analogy, there being no resemblance between the position of a mortgagee whose rights are derived from agreement with the mortgagor and that of a Muhammadan widow whose right to retain the property possession of which has been peaceably and lawfully acquired by her is one conferred by Muhammadan Law. "The right to get immediate possession of the land at the date when a suit to recover is in fact instituted is a wholly different thing, a wholly different *res*" their Lordships say, "from the right to recover it at some future time and possibly under wholly altered circumstances. The non-fulfilment of the condition attached to the decree in the earlier suit only extinguished the right to recover immediate possession as actually claimed and would not and did not extinguish the rights of the plaintiffs to the inheritance of or their rights to recover possession of the lands at some future time." Their Lordships accordingly hold that the second suit was not barred.

Their Lordships also hold that the alienees were not entitled to retain possession till the dower debt was paid for the sufficient reason that the right (assuming it could be transferred) had not been transferred to them, all that was transferred to them being the property which the widow claimed to be entitled absolutely in the events that had happened. This appears like a very technical view unless it is to be supported on the ground that the right of the widow is not in the nature of an interest in land but a mere personal right. If it was an interest in immoveable property, having regard to S. 8 of the Transfer of Property Act, that interest would have passed to the transferee.

Their Lordships further hold that the widow had lost her right to retain possession by parting with it in favour of the alienee. Obviously that was not her intention but if her right was incidental to the *fact* of possession, if that possession was lost, her right ceased.

Another point also requires to be noticed. Their Lordships hold that although the previous judgment did not operate as *res judicata* so as to bar the plaintiff from suing afresh for possession, it did bar him from re-agitating the question as to the amount due by way of dower, and as to the state of accounts on the date of the decree. From this it is clear that in their Lordships' judgment the dismissal of a suit has not the result necessarily of wiping out all the findings in favour of the plaintiff.

ASKARAN CHOUTMAL *v.* THE E. I. RY CO., I L R 52 Cal. 386.

The question that arose in this case as to the limits of Counsel's power to compromise suits by settlement outside the Courts is one of great importance and it is somewhat strange that there is no decision either in England or in this country directly dealing with the question. Notwithstanding the doubts expressed by B. B. Ghose, J., sitting with Walmsley, J., in the case noted at p. 390 doubting the expediency of importing into this country the English rule as to the authority of Counsel to compromise actions in the course of its conduct or trial in Court, there seems to be a large body of judicial opinion that Counsel have such a power irrespective of the client's instructions in that behalf and even contrary to the instructions of clients, provided that such instructions were not known to the opposite party. *Jang Bahadur Singh* v. *Shanker Rai* (1); *Nilmoni Chaudhuri* v. *Kedar Nath Daga* (2); *Nundo Lal Bose* v. *Nistarini Dassi* (3), *B. N. Sen and Bros.* v. *Chuni Lal Dutt & Co.* (4). Since the decisions of the House of Lords in *Neale* v. *Gordon Lennox* (5), it has been considered that if the client has imposed any conditions on the Counsel's right to compromise but Counsel compromised without regard to the conditions, the compromise will not be given effect to by the Court provided that the limitation is brought to the notice of the Court before a judgment by consent is drawn up. *Shepherd* v. *Robinson* (6). There are some observations against the authority of Counsel to compromise actions by arrangements outside the Court by Lord Cranworth in *Green* v. *Crockett* (7); but the manner of the reporting adopted in the case and some of the later observations therein detract to some extent from the case being treated as an authority on the question. In the absence of any clear and binding authority on the point, the discussion by Page, J., in the case under notice is particularly valuable. The conclusion arrived at by the learned Judge after examining all the cases having any bearing on the question is that unless such a compromise is authorised by the party or subsequently ratified by him or his agent, it is not binding on the party and cannot be made a rule

1. (1890) I L R 13 A 272 (F B).
2. (1922) 1 Pat. 489.
3. (1900) I L R 27 C 428.
4. (1923) I L R 51 C. 385.
5. (1902) A C 465.
6. (1919) 1 K. B. 474.
7. 34 L J Ch. 606.

of Court. This would clearly be the case in respect of all compromises effected by pleaders or vakils. They cannot unless specially authorised in that behalf compromise matters in suit. See *Jagapati Mudaliar* v. *Ekambara Mudaliar* (8), *Sourindra Nath Mitra* v. *Heramba Nath Bandopadhyaya* (9), and *Thenai Ammal* v. *Sokkammal* (10). It must be pointed out here that in the last noted case there are some observations against the applicability of the English rule as to Counsel's authority to compromise in this country. Those observations if they were meant as a statement of the law were *obiter* and opposed to the decisions referred to above. The authority of solicitors in England to compromise actions without reference to the client's instructions has been well recognised in the decisions. See *Welsh* v. *Roe* (11). But it is not clear whether this power has been recognised in this country. In America the weight of authority seems to be against it, see *Jagapati Mudaliar* v. *Ekambara Mudaliar* (8) and it is likely that it may not be recognised here. Indeed, there seems to be no reason why the authority of solicitors in this respect should stand on any different or higher footing than that of vakils or pleaders.

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8. (1897) I L R 21 M 274 : 8 M L J 40.
9. (1923) 45 M L J 453 (P C). 10. (1917) I L R 41 M 233.
11. 87 L J K B 520.

CHIRANJILAL RAMLAL *v.* B. N. RY. CO., LTD., I L R 52 Cal. 372.

Mr. Rustomji in his well-known commentaries on the Indian Limitation Act has adversely commented on the observations of D. Chatterjee, J., in *Radha Shyam Basak* v. *Secretary of State for India* (1) restricting the operation of Art. 31 as it stands at present to liability founded on torts and holding that in cases of contractual liability Art. 115 would be the appropriate article applicable. The decision under notice gives judicial support to the comments of Mr. Rustomji and there is great force in the observations of Page, J., in the present case that whatever might have been the true scope of the article before Act X of 1899 which introduced the words "non-delivery of or" in the article, there can be no doubt that after the amendment, Articles 30 and 31 apply to all kinds of liability whether contractual or tortious on the part of carriers. If any reason has to be given for allowing the shorter period of one year for suits against a carrier, it is to be found in the judgment of Spencer, J., in his order of reference in *Venkatasubba Rao* v. *The Asiatic S. N. Co.* (2) where the learned Judge observes that the legislature wanted to provide exceptionally for the case of carriers on account of the difficulty of investigating and settling claims preferred against them after a long lapse of time in respect of a few articles out of the quantity of goods that are constantly passing through their hands. The very question that arose in this case came up for consideration in the Full Bench case in *Venkatasubba Rao* v. *The Asiatic S. N. Co.* (2) where Mr. Justice Seshagiri Aiyar forcibly supported in his order of reference, the view that the article even as it stands now does not extend to cases of breaches of contract, but the Full Bench held that it extended to all kinds of liability. Mr. Justice Digambar Chatterjee does not refer to this Full Bench decision in *Radha Shyam Basak* v. *Secretary of State for India* (1) but only refers to the older cases prior to the Act of 1899. Even prior to that amendment it was held by Farran, J., in *Great Indian Peninsula Railway Co.* v. *Raisett Chandmull* (3) that the article was comprehensive in its scope as the liability of a carrier could ordinarily be rested both on a contract and a tort ; but the current of authority the other

1. (1916) I L R 44 C 16. 2. (1915) I L R 39 M 1 : 29 M L J 342 (F B).
3. (1895) I L R 19 B 165.

way was too strong with the result that the legislature had to step in and make the matter clear. Again there seems to be no reason as pointed out in *Mulsaddi Lal* v. *B. B. and C. I. Ry. Co.* (4) and by Page, J., in the case under notice to restrict the scope of the article to actions by consignees alone when the language of the article is general in its terms.

HAR BAKSH SINGH *v.* DAL BAHADUR SINGH, I. L. R. 47 All. 186.

In this case there is an interesting discussion as to the limits to the doctrine of incorporation or accretion. That doctrine has come up for discussion with reference to joint family estate, widow's estate and with reference to special rules of succession imposed by custom, statute or grant. Whatever latitude there might be in other cases, so far as statutes and grants are concerned, in the absence of any express provision relating to such incorporation, it is fairly well recognised that there cannot be any process of incorporation by the action of individuals by which the rule can be made applicable to the estate so incorporated. Such a statutory provision has been recently incorporated into the Oudh Estates Act by an amendment of 1910. The Hindu Law recognises the doctrine in the case of widow's estate as well as joint family estate. Similarly custom seems to recognise it in the case of impartible estates. The requisites of an incorporation vary in each of these cases. In the case of joint family the blending of the incomes of self-acquisition and joint family property might lead to that inference. In the case of the widow, the Bengal doctrine apparently is that if she does not show a clear intention to keep acquisitions out of the income of the husband's estate separate, they are presumed to be incorporated, while the view obtaining in Madras is that unless she shows a clear intention to incorporate the presumption is that she keeps them separate. In the case of impartible estate mere blending of the income of the estate with that of any other separate estate cannot, in the slightest degree, give rise to any such inference. For, as pointed out by their Lordships of the Privy Council in *Rani Jagadamba Kumari* v. *Wazir Narain Singh* (1) "the income when received is the absolute property of the owner of the impartible estate. It differs in no way from property that

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1. L R (1922) 50 I A 1.

4. (1920) I L R 42 A 590.

he might have gained by his own effort, or that had come to him in circumstances entirely disassociated from the ownership of the Raj. It is a strong assumption to make that the income of the property of this nature is so affected by the source from which it came that it still retains its original character."

Even apart from incorporation, Mr. Justice Kanhaiya Lal refers to a presumption (though rebuttable) that the same custom that governs the estate also governs property acquired out of it relying upon *Nawab Ibrahim Ali Khan* v. *Nawab Muhammad Ahsan Ullah Khan* (2) and *Murtaza Husain Khan* v. *Mahomed Yasin Ali Khan* (3). Both these were cases relating to Muhammadans in whose case, if a custom of special succession relating to ancestral property is established, the same rule should be presumed to govern the other property as well for there is no basis for the distinction between one kind of property and another under that law. The same rule might apply to parties who are governed by purely customary law and in respect of whom there is no statutory presumption that they are governed by Hindu Law. In the case of Hindus, the rule is that they are governed by that law except in so far as custom has been proved to govern. "Where a custom is proved to exist it supersedes the general law, which, however, still regulates all outside the custom." *Ram Nundun Singh* v. *Janki Koer* (4), *Neelkisto Deb Burmono* v. *Beerchunder Thakoor* (5). In the case of ordinary Hindus, therefore, from the mere fact that a custom governs the descent of a particular estate, it is impossible to presume that it governs the property acquired by him out of the income of the estate. Mr. Justice Kanhaiya Lal notices the difficulty but the explanation that he gives seems to ignore the fact that the income of the property stands on the same footing as any separate property of the man.

BHAGWAN DAS *v.* SURAJ PRASAD, I. L. R. 47 All. 217.

We had a discussion somewhat analogous in the Madras High Court as to rent sales whether the Civil Court could set aside these sales for irregularity but it was never doubted that the Civil Courts could do so when fraud was proved. Here

2. L R (1911) 39 I A 85. 3. L R (1916) 43 I A 269.
4. (1902) I L R 29 C 828 at 858 (P C). 5. (1869) 12 M I A 523, 542.

the question was whether a sale by the Collector in execution of a Civil Court decree could be impeached on the ground of fraud. In the view of the Court that O. 21, R. 92 did not apply to sale by the Collector, there could be no doubt that a suit lay for the purpose.

MUHAMMAD IBRAHIM *v.* ALTAFAN, I. L. R. 47 All. 243.

In this case a curious point of Muhammadan Law as to annulment of marriage on the ground of impotency of the husband arose. Under that Law in such a case the husband is entitled to be given access for a year more and if he fails to consummate marriage even during that period, the marriage is to be annulled. There were somewhat analogous rules under English Law—for instance, at one time, three years' co-habitation was insisted upon before annulment could be ordered and similarly if the Court was not satisfied as to the facts it would suspend the decree in order that further attempts might be made at consummation. These peculiar rules are no longer held binding and annulment has been ordered in recent times after much shorter period of co-habitation and with no further period of probation. The learned Judge thought that the rule was a rule of substantive law and not one merely of evidence. In Muhammadan Law, as in other systems of law, in the guise of a rule of evidence, there is so often to be found a rule of substantive law.

SECRETARY OF STATE FOR INDIA *v.* RAMANUJACHARIAR, I. L. R. 48 Mad. 282 : 47 M. L. J. 780.

This is a very important judgment in that it is the first judgment of its kind in the Madras High Court which lays down that the settlement binds the Government during the period of 30 years and a suit will lie if the Government acts contrary to it. Owing to the somewhat wide language of S. 58, Revenue Recovery Act, there was a vague feeling though there was no express decision to that effect that the Government's action, though improper, could not be the basis of an action in Civil Courts. The dictum of the Privy Council in *Prasad Rao* v. *The Secretary of State for India* (1) helped the conclusion.

THE PRESIDENT, TALUK BOARD, HOSPET *v.* CHANDRAPPA, I. L. R. 48 Mad. 309 : 47 M. L. J. 774.

The question in this case was whether a person ceases to be an Honorary Magistrate the moment he sends in his resignation or only when his resignation is accepted by the Local Government. It was held following the decision in *Sudarsana Rao* v. *Christian Pillai* (2) that he ceases to hold office only when the resignation is accepted. It may be right enough to say that no trust (all public offices are in the nature of trust) can be renounced without the consent of the beneficiaries unless a power of renunciation is given expressly in the deed of trust or by the authority creating the trust. In other words, the right of resignation does not inhere to every office. But where the right of resignation is given, the *raison d'etre* for the rule disappears and the resignation terminates the office unless of course the very deed or authority requires any further act to be done before the resignation takes effect. Though the Statute should prescribe that some further act should happen before the vacancy occurs, such as a declaration by the Council that the office has become vacant, if the declaration is compulsory, the member cannot revoke his resignation or take part in or discharge the duties of his office after the resignation. *The Queen* v. *The Mayor and Town Council of Wigan* (3) and *Pease* v. *Lowden* (4). Directors of companies, for instance, cannot re-

1. (1917) I L R 40 M 886 : 33 M L J 144 (P C).
2. (1925) 45 M L J 798.
3. (1885) 14 Q B 908.
4. (1899) 1 Q B 386.

sign their office without the consent of the Corporation but if the articles authorise resignation, the resignation takes effect independently of acceptance by other directors or by the company. 5 Halsbury 241. As Lindley, L. J. puts it in *Finch* v. *Oake* (1) "there is no law that a resignation that cannot be refused must be accepted before it can take effect." This point of view is well brought out in Paine on *Elections* by reference to American authority.

BOARD OF REVENUE *v.* SOUTH INDIAN RAILWAY CO., LTD., I. L. R. 48 Mad. 368 : 48 M. L. J. 461.

Though in the abstract, the difference between a lease and a license is very clear, in practice it becomes often difficult to say whether a particular transaction is a lease or a license and the difficulty is enhanced not unoften by loose use of words, such as rent, re-entry, etc. Here the Special Bench had to decide whether the document in question which conferred the privilege of stacking coal on the Municipality of Chidambaram was a lease or merely one granting a license. On a construction of the whole document, their Lordships held that the document conferred only a license and the circumstances that weighed with them were first that it was not competent for the South Indian Railway Company to grant a lease and secondly there was an express clause which said that nothing therein contained should be construed to create a tenancy. One should think as the House of Lords thought in a recent case with respect to contract which wound up with saying that nothing in the document should be construed as giving rise to a contractual liability but that the document should be construed merely as giving rise to a debt of honour, that the clause was conclusive as to its not amounting to a lease though it is generally true that it is not what the parties call a transaction but what the transaction having regard to the terms as a whole in fact is that gives the transaction its appropriate character. In *Glenwood Lumber Co.* v. *Phillips* (2) the Privy Council construed a document purporting to grant a license as really amounting to a lease — the chief characteristic of the latter being according to their Lordships a right to exclusive possession.

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1. (1896) 1 Ch. 409 at 415.
2. (1904) A C 405.

MUSSAMAT HIRA BIBI *v.* RAM HARI LAL, 49 M. L. J. 240 (P. C.).

The decision of the Judicial Committee in this case will, it is hoped, settle a vexed question in the Law of Evidence dealing with the proof of documents *required by law to be attested*. The trend of the recent pronouncements of the Judicial Committee has been more and more towards a rigorous insistence on the observance of the formality of attestation according to law in the case of such documents. As regards documents whose attestation is optional, a party is free now as ever to give such evidence as he pleases. Even where it is compulsory, the earlier view of the Courts in this country was to treat the attestation as a common formality and hold the document to be sufficiently proved, if they were satisfied as to the genuineness of the document, though, no doubt, there were a few cases now and then sounding a stricter note. But the turn towards the stricter view was made when the Privy Council ruled in *Shamu Patter* v. *Abdul Kadir Ravuthan* (1) that the persons signing as witnesses must be present at the execution of the instrument and sign their names after seeing the actual execution of the same [*see* also *Ganga Prasad Singh* v. *Ishri Prasad Singh* (2) and *Padarath* v. *Ram Narain Upadhia* (3)].

The exact scope of S. 70 was, however, by no means clearly laid down. An early case in *Jogendranath* v. *Nitya Charan* (4) decided that the admission of a party during trial will not dispense with the necessity of calling the attesting witnesses, though in that case, on the facts the Court presumed valid attestation. It may be mentioned here that it was also doubted whether the admission of execution mentioned in S. 70 referred only to one made in the course of the trial. [See *Asharfi Lal* v. *Mt. Nannhi* (5); also *Raj Mangal Misir* v. *Mathura Dubain* (6), *Abdul Karim* v. *Salimun* (7) and *Hori Lal* v. *Bhagwan Bakhsh* (8)]. The case in *Jogendra Nath* v. *Nitya Charan* (4) was strongly criticised by Messrs. Woodroffe and Ameer Ali in their book on Evidence as overlooking the situation of S. 70 in the Act and the later decisions of that Court have almost uniformly declined to follow that

1. (1912) I L R 35 M 607 : 23 M L J 321 (P C). 2. (1918) I L R 45 C 748.
3. (1915) I L R 37 A 474. 4. (1903) 7 C W N 384.
5. (1921) I L R 44 A 127. 6. (1915) I L R 38 A 1.
7. (1899) I L R 27 C 190. 8. (1916) 34 I C 281.

decision [*Satish Chandra Mitra* v. *Jogendra Nath* (9) and *Shib Charan* v. *Bepin Behary* (10)]. But some cases have held that unless it is an unqualified admission of execution, *i. e.*, an admission "plain and simple, capable of being construed as an admission of due execution in the presence of the attesting witnesses," the party using the document may have to prove the attestation, and reliance is placed for this qualification on the difference between "execution" and "signature" in Ss. 70 and 69. [*Arjun Chandra* v. *Kailas Chandra* (11)]. The Allahabad High Court also has been of the same view. [See *Asharfi Lal* v. *Mt. Nannhi* (5); *Radhe Shiam* v. *Chunni* (12)]. But in Bombay the decisions have not been quite so uniform and they divide these cases into three classes: (1) Cases where it is apparent on the face of the document that the attestation has not been proper; (2) Cases where the party has been put to proof of attestation of the document; (3) Cases where, on the face of it, the attestation is proper and the pleadings do not raise any issue about it. In the first two cases they hold that the admission of execution does not dispense with the proof of attestation and in the third that it does dispense with such proof as against him. [See *Jagannath Narsingdas* v. *Ravji* (13) and *Dalichand Shivram* v. *Lotu Sakharam* (14)].

In England it seems to be the law that the attesting witness must be called even though the document be one the execution of which is admitted by the party to it. And under the Common Law, before the Common Law Procedure Act, it was so even in the case of a document to the validity of which attestation was not requisite. "The general rule which requires the production of an attesting witness, when the validity of the instrument depends upon its formal attestation is so inexorable that it applies even to a document the execution of which is admitted by the party to it; and that too, though such admission be deliberately made in open Court, or even in a sworn answer to interrogatories delivered by the parties to the case." [Taylor, S. 1843.] In some Acts express provision is made to the effect that a document required by that Act to be attested may be proved by the evidence of a person

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5. (1921) I L R 44 A 127.
9. (1916) I L R 44 C 545.
10. (1922) 27 C W N 144.
11. (1922) 36 C L J 373.
12. (1916) 14 A L J 361.
13. (1922) I L R 47 B 137.
14. (1919) I L R 44 B 405.

who is able to bear witness to the requisite facts without calling the attesting witness or witnesses or any of them.

Their Lordships of the Judicial Committee have now definitely ruled in this case that before the admission of execution can be relied upon, it must be proved to be a document duly attested, thereby inclining to the view of Mr. Das, J. [the High Court judgment is reported in *Musammat Hira Bibi* v. *Ramdhan Lal* (15)] that the rule as to attestation is a rule of law affecting the validity of the instrument and not merely a rule of evidence affecting the proof of the document. The effect of so holding will be even to go farther than the Bombay decisions and to compel a party to prove attestation unless there be a specific admission by the party in the pleadings as to valid attestation. It is to be remembered that in this country when a document fails as a mortgage, it does not even serve to create a charge [*Ram Narain Singh* v. *Adhindra Nath Mukherji* (16)] and possibly also that secondary evidence of execution cannot be given by "presumptive or other available evidence" in the absence of the proof of the handwriting of witnesses. [See *Bobardhan Das* v. *Hari Lal* (17)].

MANAVEDAN TIRUMALPAD *v.* MESSRS. PARRY & CO., 49 M. L. J. 390.

We agree that it is only in cases where there is some incompatibility between the enjoyment under the new lease and the enjoyment under the prior lease that the second will involve a surrender of the first; but, to go further and say (in the words of Ramesam, J.) that even where the leases are of the same kind, and the terms of the second are somewhat inconsistent with the first, no surrender of the first need be implied, seems to us to ignore the illustration appended to S. 111 of the Transfer of Property Act itself. After the decision of the Privy Council in *Mahomed* v. *Yeoh* (1) illustrations appended to the sections of a statute must be regarded very much as part of the statute itself and cannot be rejected, except as a last resort, when they are repugnant to the sections.

Of course, where the new lease fails as not being valid, there can be no surrender of the old lease, for, as pointed out

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1. (1917) M W N 162 (P C).

15. (1921) 6 Pat. L J 465.

16. (1916) I L R 44 C 388.

17. (1913) I L R 35 A 564.

in *Jamini Mohan Sarkar* v. *Debendra Narayan Singh* (2), the "new lease" in the illustration to S. 111 must reasonably be construed as a new *valid* lease. On the assumption that the new lease only overlaps the first, his Lordship Justice Ramesam naturally concludes that there is a cancellation of the first only for the period for which it is overlapped by the second. We submit that this is not correct either, for the illustration says that on the lessee accepting a new lease, the old lease is *determined* and this is in accordance with, the English Law [Foa on *Landlord and Tenant*, p. 696, *Crowley* v. *Vitty* (3)].

Baron Parke in *Lyon* v. *Reed* (4) says that "the reason why such acceptance of a new lease operates as a surrender of the first is because the lessee, by accepting the new lease, has been party to an act, the validity of which he is estopped afterwards from disputing.; and which would not be valid if the first lease continued to exist, for he would be estopped from saying that the lessor had not power to make the lease." The power of the lessor therein referred to is not, as Justice Ramesam assumes, the power to put the lessee in possession, but the power to *grant* the new lease, for there cannot be two concurrent tenancies of the same premises. In these cases the implied surrender occurs because the lessor does and the lessee assents to an act which is inconsistent with the continuance of the original lease.

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2. (1922) 71 I C 976. 3. (1852) 7 Ex 319. 4. (1844) 13 M & W 285.

HANMANT GURUNATH *v.* RAMAPPA LAGAMAPPA, I. L. R. 49 Bom. 309.

The main question that arose in this case was whether the alienee from a ward after his attaining majority could avail himself of Art. 44 of the Limitation Act and sue for setting aside an alienation of the property by the minor's guardian when he was an infant, within three years of his attaining majority. The question is one of considerable difficulty and the learned Judges refrained from deciding it and disposed of the case on other grounds which are not easily intelligible. The learned Judges, however, express their inclination against the applicability of the article to suits by alienees from the ward after his attaining majority. Although the terms of the first column of Art. 44 refer to a suit by a ward after attaining majority, it has been held by a Full Bench of the Bombay High Court in *Fakirappa Limanna* v. *Lumanna bin Mahadu* (1), that a person claiming under the ward would be affected by Art. 44 and if no suit is brought within three years of his attaining majority, the person claiming under him will equally be barred. Even this point is not without conflict as will be seen from *Abdul Rahman* v. *Sukhdayal Singh* (2). The reason of the rule in *Fakirappa Limanna* v. *Lumanna bin Mahadu* (1) is to be found stated by the Privy Council in *Gnanasambanda Pandara Sannadhi* v. *Velu Pandaram* (3) that after the lapse of three years under Art. 44, the right to the property is extinguished under S. 28, whether it is of the ward or of those claiming under him. If thus the disability to sue after three years attaches to the persons claiming under the ward it may be argued with some force that an alienee from the ward after attaining majority may be entitled to sue within three years after his attaining majority. It is difficult to believe that if the ward dies shortly after attaining majority his heir cannot sue under Art. 44 within three years after the prescribed date. The question cannot, we think, be easily disposed of by saying that Art. 44 is merely an illustration of Ss. 6 and 7 of the Act relying on the Full Bench decision of *Doraisami Serumadan* v. *Nondisami Saluvan* (4), because whatever may be said of the personal disability of the infant when he is under age, there can be no such personal disability attaching to him after he attains majority to lead to the conclusion that Art. 44 affords

1. (1919) I L R 44 B 742 (F B). 2. (1905) I L R 28 A 30.
3. (1899) I L R 23 M 271 : 10 M L J 29 (P. C.).
4. (1912) I L R 38 M 118 : 25 M L J 405 (F B).

a personal protection to the ward. Further, as pointed out in the arguments in the case under notice, Art. 44 abridges in many cases the period of limitation allowed by S. 6, as for instance when the alienation by the guardian is made a few months before his attaining majority in which case he will be barred under Art. 44 if he does not sue within three years after attaining majority, although he would seem to have a longer period under Ss. 6 and 7 of the Act. We may also point out that the reasons which led to the alienee from the minor not being entitled to the exemption provisions in S. 6 of the Act which makes provision for some classes of representatives based on the rule of *expressio unius*, can have no application to cases falling under Art. 44. These considerations would tend to show that a person claiming under a ward after majority might invoke Art. 44 in his favour.

The other point raised in the case as to whether the alienee from the ward after attaining majority can get a decree for possession against the purchaser from the guardian of the minor under a sale which was not binding on the minor is again not quite clear even though the guardian of the minor is a party plaintiff in the suit. If, as is suggested in one portion of the judgment, all that the alienee purchased was a mere right to sue the former purchaser from the guardian and such an alienation was bad under S. 6 (*e*) of the Transfer of Property Act, it is by no means clear that he can rely on his contract and enforce it even against his alienor by specific performance or otherwise. If the alienation of the right to sue is bad, the contract to sell the right to sue would seem to be equally bad: Cf. *Sri Jagannadha Raju* v. *Sri Raja Prasada Rao* (5), *Annada Mohan Roy* v. *Gour Mohan Mullick* (6) and *Aumanchi Auryaprabhakara Rau* v. *Gummudu Sanyasi* (7) which are cases under the analogous provision of S. 6 (*a*) of the Transfer of Property Act. If this is correct, the only person who could sue the former purchaser from the guardian and recover the property sold would be the ward himself and not his alienee at all. It seems, however, doubtful whether what is sold by the ward after attaining majority in the case under notice is a mere right to sue and not property. Cf. *Venkateswara Aiyar* v. *Raman Nambudri* (8).

5. (1915) I L R 39 M 554 : 28 M L J 650.

6. (1923) 50 I A 239 : 50 C 929 : 45 M L J 617 (P C).

7. (1925) 48 M L J 598.

8. (1916) 3 L W 435.

IMTAZ-UN-NISSA *v.* CHUTHAN LAL, I. L. R. 47 All. 304.

This case in so far as it holds that the objection taken does not come within S. 47 seems to be opposed to the ruling of the Privy Council in *Ramabhadra Naidu* v. *Kadiriyasami Naicker* (1), whether the purchaser is or is not a representative of the decree-holder, the question is obviously one relating to execution—as to what is included in the decree and what could and has been validly sold under the decree. The other point decided, *viz.*, that the application was barred by O. 21, R. 92 seems to be equally open to exception—the objection not being one raising a question of fraud or irregularity in the conduct or publication of the sale.

In re, TURKA HUSSAIN SAHEB, I L R 48 M 385 : 47 M L J 661.

This case points out the impropriety of disposing of criminal appeals on the day of the presentation of the appeal. The observations are very valuable and it is hoped that due attention will be paid to them.

KALYANJI *v.* RAM DEEN LALA, I. L. R. 48 M. 395 : 48 M. L. J. 290.

Appeal against an order under S. 476, Criminal Procedure Code, passed by the Presidency Small Cause Court lies according to this ruling to the High Court and not to the Full Bench of the Small Cause Court. The conclusion is based on two grounds: first, that the Small Cause Court sitting to hear appeals under S. 38, is the same Court as the one disposing of the suit ; secondly, that S. 38 is not a case of appeal at all and the Court hearing it cannot be said to be one to which appeals ordinarily lie. The former ground, though much trotted out once, has become somewhat shaky since the decision of the Privy Council in *Sabitri* v. *Savi* (2), but we think the latter is a sufficient ground for the decision and is also a sound basis for the decision. Neither S. 96, Civil Procedure Code, nor S. 195, Criminal Procedure Code, necessarily connotes the idea that the two Courts should be distinct. The appeal may be from the same Court to the same Court. A

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1. (1921) I L R 44 M 483 (P C).
2. (1921) I L R 48 C 481 : 40 M L J 308 (P C).

further question arose in the case as to whether the appeal should be heard by the Appellate Side or the Original. On this point the Bench followed the earlier decision in *Munisamy Mudaliar* v. *Rajaratnam Pillai* (3) which held that the side of the High Court which should hear the petition should be determined by the nature of the application.

APPICHI GOUNDAN *v.* KUTTIYAMMAL, I L R 48 M. 388 : 48 M L J 187.

This decision brings into prominence the quasi-civil nature of the proceedings under S. 488, Criminal Procedure Code and the hardship caused by applying the rules of criminal procedure to such proceedings when the respondent is a lunatic. But in these proceedings non-compliance with the order results in imprisonment of the respondent and, as such. the application of criminal procedure cannot be said to be inappropriate. The remedy is to provide an alternative summary civil procedure for such cases.

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3. (1922) I L R 45 M 928 : 43 M L J 375 (F. B.).

HANMANT SUBBAYA *v.* KRISHNA MANJINATH, I. L. R. 49 Bom. 604.

A widow in possession of her husband's estate alienated a part of it for no justifiable purpose and then made an adoption. The adopted son died some years afterwards and the widow then made a second adoption. The second adopted son sued to set aside the alienation by the widow and the learned Judges have held that he would have a cause of action from the date of his own adoption and that the lapse of 12 years from the date of the first adoption is immaterial. We venture to doubt the correctness of this view. There are no doubt some difficulties in the way of regarding the second adopted son as the "legal representative" of the first adopted son, but it nevertheless seems to us difficult to sustain the conclusion in this case.

Though as early as in *Vellanki Venkata Krishna Rao* v. *Venkata Rama Lakshmi* (1) the Judicial Committee recognised the validity of an adoption made by a mother on the death of her son and in *Suryanarayana* v. *Venkataramana* (2) the power of the mother to make a second adoption on the death of the first adopted son has also been recognised, it has never been definitely laid down what the principle is, on which the later adopted son divests the mother of the estate which she had taken as heir to her first son. In *Ramaswami Aiyan* v. *Venkataramaiyan* (3) the Privy Council left this question open. In *Rai Jatindra Nath Chaudhuri* v. *Amrita Lal Bagchi* (4) a Bench of the Calcutta High Court held that notwithstanding the doubt suggested in *Ramaswami Aiyan* v. *Venkataramaiyan* (3) the decision in *Vellanki Venkata Krishna Rao* v. *Venkata Rama Lakshmi* (1) warranted the view that the second adopted son would divest the mother of the estate which she had taken as heir to her first son and the learned Judges justified this on the ground that the act of adoption is the voluntary act of the widow and that its very object is to create an heir to her husband. [*See.* also Trevelyan, J. in *Amrito Lall Dutt* v. *Surnomoni Dasi* (5) and *Jamnabai* v. *Raychand Nahalchand* (6), *Ravji Vinayak* v. *Lakshmibai* (7) and *Lakhmi Chand* v. *Gatta Bai* (8). Commenting on this decision, Mr. Sarkar Sastri says that

1. (1876) I L R 1 M 174 (P C).
2. (1906) I L R 29 M 382 : 16 M L J 276 (P C).
3. (1879) I L R 2 M 91 (P C).
4. (1900) 5 C W N 20.
5. (1898) I L R 25 C 662 at 692.
6. (1883) I L R 7 B 225.
7. (1887) I L R 11 B 381 at 395.
8. (1886) I L R 8 A 319.

the case for divesting the mother is even stronger in the case of Mitakshara families, for the second son may be regarded as a co-parcener with his brother by assuming the fictional existence of the second son to date from the moment of the death of the adoptive father. He also supports the decision on the equitable ground that otherwise the adopted son will not even be entitled to claim maintenance during the mother's lifetime, whereas in the other view, the mother will certainly be entitled to maintenance and could even protect herself by any reasonable ante-adoption agreement. Messrs. West and Buhler suggest that in such cases the widow must be understood to be in possession as a kind of 'manager' during the interval between the death of the first son and the adoption of the second. It is difficult to find acceptance for this view at the present day in view of the reasons put forward by Bhashyam Aiyangar, J., in *Sriramulu* v. *Kristamma* (9) which are equally applicable to this stage of the widow's possession. There can be no doubt that the first son took the property as *full* owner and on his death succession has to be traced to him [see *Desai* v. *Desai* (10)]. *Prima facie* the mother being the nearer heir, the second son could not divest her on the assumption that he was fictionally in existence at the date of the first son's death and therefore reliance has to be placed upon the further fiction that he was in existence at the date of his adoptive father's death. But this fiction cannot help to support the view taken by the learned Judges in this case ; for pressed to its logical result it would lead to the conclusion that the right of the second son to question the alienation might have become barred even before he was actually adopted.

The right of the adopted son to question an alienation by his mother is held to date from the moment of his adoption, not upon the fiction of his existence from the moment of his father's death, but upon the ground that the widow's estate held by his mother came to an end on the adoption (*See* Mayne's Hindu Law, S. 197). In this view the estate in virtue of which the alienation was made must be held to have terminated once for all when the widow made the first adoption. The estate which she may subsequently take on the death of the first adopted son is acquired by her in a different character altogether and the termination of that estate by the second adoption cannot pro-

9. (1902) I L R 26 M 143 : 12 M L J 197.
10. (1924) 46 M L J 598 at 601.

perly be regarded as furnishing to the second adopted son a fresh cause of action for impeaching an alienation which the lady made not in her new character (in which case the second adopted son would have a cause of action from the date of his adoption) but in her former character.

Looking at the matter in another way the case may be put thus : The first adopted son could undoubtedly have sued to recover possession from the alienee and if he allowed twelve years to elapse without so doing, the alienee would acquire an absolute title by prescription. If, thereafter, the estate passes to the widow on the first son's death and the widow then makes a second adoption it seems to us impossible to suggest that the alienee's prescriptive title can be disturbed by the second adoption. Can it make any difference in principle if the first adopted son dies before the expiry of twelve years from the date of his adoption or the acquisition of a prescriptive title by the alienee ?

A question may indeed arise whether, if the first adopted son should die within twelve years of the adoption and the mother should succeed to the estate, she could as heiress of her son assert his right to impeach the alienation which she had herself made when in possession as heir to her husband. If she could do so at all, it must only be on the cause of action that had accrued to the adopted son and certainly within the period of limitation from the accrual of that cause of action. If she allows the period of twelve years from the date of the adoption to expire, is it possible to suggest that the second adopted son when he seeks to dispute her alienation can get over the prescriptive title of the alienee ? The case is not one which can be brought within Art. 141 of the Limitation Act and if 144 is the Article applicable, the adverse possession of the defendant had commenced long ago and such possession must be held to be adverse to the 'plaintiff' as well though he may not derive title from the mother or from the first adopted son, because these two undoubtedly represented the estate for the time being and the first adopted son represented it as full owner.

If the theory enunciated by Bhashyam Aiyangar, J., in *Sriramulu* v. *Kristamma* (9) be accepted, some anomalies may be avoided ; because according to his view, neither the first adopted son nor the second adopted son can question the widow's alienation as long as she is alive. But that view has

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9. (1902) I L R 26 M 143 : 12 M L J 197.

not been followed in any of the Courts in India [*Vaidyanatha Sastri* v. *Savithri Ammal* (11), *Ramakrishna* v. *Tripurabai* (12), *Amrita Lal Bagchi* v. *Jatindra Nath Chowdhry* (13) and *Sahadeo Singh* v. *Ramnandan Singh* (14)].

A point of some nicety may arise in cases in which the first adopted son may die while yet a minor. Under S. 6, cl. (3) of the Limitation Act the benefit of the extended period of limitation can be availed of even by the legal representative and in the case of successive disabilities time is extended till after the cessation of the last disability [S. 6 (cl. 4)]. If in the case above suggested the interval between the death of the first adopted son and the second adoption could be otherwise disposed of, the second adopted son may be able to get the benefit of S. 6. As to the intervening period, there is the question already mooted whether the widow could maintain a suit to impeach her own alienation. Assuming that she could not, can that be said to be a disability within the meaning of S. 6 of the Limitation Act? If equitable considerations were permissible in the application of the Limitation Act, it may be suggested with considerable force that the period during which the person in possession could not sue to impeach her own alienation should not be calculated against the second adopted son, but seeing that time has already begun to run from the date of the first adoption, the case would seem to fall under the first part of S. 9 and the decisions of the Privy Council would seem to preclude the application of equitable considerations.

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11. (1917) I L R 41 M 75: 33 M L J 387 (F B).
12. (1908) I L R 33 B 88.
13. (1904) I L R 32 C 165.
14. (1907) 4 A L J 354.

PRAN MOHAN DAS *v.* HARI MOHAN DAS, I. L. R. 52 Cal. 425.

The question that arose in this case was whether when a father agreed to give his daughter certain properties on marriage and possession of the properties was given to the daughter on marriage and only an unregistered instrument was executed in her favour, she is entitled to rely on the doctrine of part-performance in a suit in ejectment by the father or his heirs. In England under S. 4 of the Statute of Frauds, a contract made upon consideration of marriage to be enforceable has to be evidenced by some memorandum or note in writing signed by the party to be charged or by some person authorised by him to sign ; and the question has arisen whether when a father or other relation agreed to settle property on the daughter in consideration of marriage and possession of the same was given under the agreement, the informality of the contract would be available to the father or the other person. In such cases it has for a long time been held on the application of the rule of part-performance that by reason of the further equities arising by the delivery of possession, the informality of the contract is no longer available. *Surcome v. Pinniger* (1), *Dungannon (Lord)* v. *Smith* (2) and *Ungley* v. *Ungley* (3). With the recognition of the rule of part-performance in this country in *Mahomed Musa* v. *Aghore Kumar Ganguli* (4) and the cases following it, it would seem clear that part-performance would be a valid plea in the case under notice. In this connection it may not be out of place to mention that there has been a discussion as to what acts would amount to part-performance taking the case out of the statute and what acts would not amount to such part-performance. It has been held, for instance, that marriage itself is not sufficient part-performance to take the case out of the statute. *Dundas* v. *Dutens* (5) and *Lassence* v. *Tierney* (6). The result will be that if the marriage takes place and the daughter enters by a trespass without possession being given to her under the agreement, the plea of part-performance will not be available to her as her possession is not referable to the agreement. It would be a question whether even in such a case she could rely on the rule in *Walsh* v. *Lonsdale* (7) and treat that as done which ought

1. 3 De G M & G 571. 2. 12 Cl & F 616.
3. L R (1877) 5 Ch D 887. 4. (1914) I L R 42 C 801 : 28 M L J 548 (P C).
5. 1 Ves Jun 196. 6. 1 Mac & G 551.
7. L R (1882) 21 Ch D 9.

to have been done. The rule in *Walsh* v. *Lonsdale* (7) would seem also to require that possession of the property should have been given under the agreement. Cf. *Murgatroyd* v. *Silkstone and Dodsworth Coal and Iron Company, Ex parte Charlesworth* (8). To hold otherwise will, we apprehend, have the effect of making the provisions of the Registration Act and the Transfer of Property Act, etc., regarding the formality of contracts in many cases a dead letter. The doctrine of part-performance itself was not received in England without protest. *See* per Lord Blackburn in *Maddison* v. *Alderson* (9).

SURA LAKSHMIAH CHETTY *v.* KOTHANDARAMA PILLAI, I. L. R. 48 Mad. 605 : 49 M. L. J. 109 (P. C.).

There is no new point of law decided in this case nor for the matter of that, any fresh light thrown on any debated point of law. The case merely reiterates the well-known principle that the English rule as to presumption of advancement in favour of the wife in the case of a purchase in her name out of the funds supplied by the husband does not apply in India. The Appellate Court were doubtless also fully aware of this but on a consideration of the facts they came to the conclusion that the purchase was in pursuance of an ante-nuptial agreement by the husband to settle property on the wife While not saying that an ante-nuptial agreement may not be orally proved in India their Lordships say that it would be unwise to act in a disputed Indian case upon oral evidence that there has been an ante-nuptial agreement, which would in effect be a marriage settlement, unless there was contemporaneous written evidence to corroborate oral evidence—a direction as to appreciation of oral evidence, we think, somewhat widely stated and in any case hardly of much use.

Where an ante-nuptial agreement is set up to rebut the presumption of benamee, no doubt, it lies upon the person setting it up to prove it. In spite of the language used in this judgment we do not believe that their Lordships intend to hold that an intention that the property should belong to the wife could not be inferred from circumstances. As early as *Narayana* v. *Krishna and another* (10) we find the Judges observing "probably it was (acquired) with the funds acquired by the father ; but if it be so, the presumption is that he intend-

7. L R (1882) 21 Ch D 9. 8. 65 L J Ch 111.
9. (1883) 8 A C 467. 10. (1884) I L R 8 M 214.

ed that the notes transferred to his wife should become her property, and this presumption would be confirmed if it is found that in the life-time of her husband in the presence of sons jealously watching dispositions of the family wealth she is allowed to deal unchallenged with the property standing in her name." Their Lordships of the Privy Council do indeed refer to the mode of dealing with the property. S. 82 of the Trusts Act which deals in fact with Benamee lays down that only "where property is transferred to one person for consideration paid or provided by another person and it appears that such other person did not intend to pay or provide such consideration for the benefit of the transferee, the transferee must hold the property for the benefit of the person paying or providing the consideration." It should not be forgotten that "although it is not unusual for property to be transferred to the name of a female member to protect it from the creditors of the male members or to place it beyond the risk of extravagance on the part of the male members, such dealings are exceptional and can afford no ground for a general presumption" in cases where there is no room for such an inference and the notions and sentiments of modern India have considerably changed and it is not infrequent that husbands purchase property in the names of wives to free them from the tender mercies of members of the family or even of their children. Supremely oblivious of the changed conditions of India, Sir John Edge reiterates the old rule without qualification or even an idea that it might require qualification. All these rules require periodical re-examination with reference to altered state of society and like the old rule as to presumption in the case of grants to women, this one also should be carefully qualified and restated.

KELU NAIR *v.* THE SECRETARY OF STATE FOR INDIA, I. L. R. 48 Mad. 580 : 49 M. L. J. 79.

The point that arose in this case was slightly different from that in *The Secretary of State for India* v. *Ramanujachariar* (1). The point of difference is that whereas in the earlier case there was an actual settlement with the particular individual and the Government sought subsequently to raise the assessment, in the case under review, there was no such settlement with the individual and the question broadly was—the Government having notified

1. (1924) I L R 48 M 282: 47 M L J 780.

that lands of such and such a description would be assessed at such and such rates, is it open to them to demand other rates for lands of that description. In this case, the notified rate for kumri lands was 2 annas an acre, but they demanded a rate of 8 annas for the plaintiff's kumri alone. Whether it was open to the Government to do so was the question in the case. It is somewhat difficult to regard the liability to pay the assessment as a result of contract. The position is not similar to that of an ordinary landlord and tenant. The payment of assessment is not the consideration for the permission to occupy the land. The land belongs to the ryotwari proprietor and the Government is entitled to levy assessment, the rates of which have got to be determined by them. The right to determine the rates comes to them by common law and by the same common law it should be inferred that they have got the right to do so by what is called a general settlement and once they fix it they have not got the right to vary the rates during the period for which they fix the rate. In some cases, questions of estoppel might arise as, for instance, when on the faith of the representation improvements are effected. But apart from this, it is difficult to see how there could be a question of contract when the settlement of rates is not a matter of bargain at all but the result of unilateral action on the part of the Government. The true position is, as we have indicated above, Government's settlement notification is the declaration of the proper rate and once the declaration is made, the proper rate is declared once for all and the liability of lands answering to the specified description is only for the revenue so declared and the Government has no right to vary it. The rate fixed by the Government is not liable to be canvassed by Courts (S. 58), but once it is settled, the Government cannot go behind it for 30 years thereafter, the *declared* period of the settlement.

SAYMA BIBI *v.* MADHUSUDAN MOHANTA, I. L. R. 52 Cal. 472.

The learned Judges in this case were obliged by the course of decisions in Calcutta to hold that where the abatement of a suit is set aside by the Court, the order cannot be questioned in an appeal from the ultimate decree in the suit. In coming to this conclusion we venture to think that the learned Judges of the Calcutta High Court have placed a too narrow construction on the expression " affecting the decision of the case " in S. 105 of the Civil Procedure Code by understanding it as limited to orders affecting the decision of the case *on the merits.* In the first place, we find no warrant for reading these words into the section. The decisions of the other High Courts are not uniform in this question ; and, in some instances, there has been a conflict of rulings in the same High Court. On the language of the section itself without anything else, it would seem that the error or irregularity in any order which will influence the ultimate decree in the suit can be questioned in an appeal from the decree. The question has mainly arisen in cases where an *ex parte* decree or a judgment dismissing a suit for default is set aside, or an abatement is set aside or a reference to arbitration or an award is set aside and a decision is given on the merits in each one of the cases and an appeal is preferred against such decision. In each one of the instances the prior order will not affect the decision of the suit on its merits, as understood by the Calcutta High Court in *Chintamony Dassi* v. *Raghoonath Sahoo* (1) and *Mussamut Kariman* v. *A. H. Forbes* (2). To illustrate the conflict that exists in the same High Court we would refer to *Gulab Kunwar* v. *Thakur Das* (3), *Tasadduq Husain* v. *Hayat-un-nissa* (4) and *Niddha Lal* v. *The Collector of Bulandshahr* (5) for the restrictive interpretation of those words in S. 105 of the Code and *Nand Ram* v. *Bhopal Singh* (6), *Ram Autar Tewari* v. *Deoki Tewari* (7), *Shah Muhammad Fakhruddin* v. *Rahimullah Shah* (8) and *Rudra Prasad Pande* v. *Mathura Prasad Pande* (9) for their literal and wider interpretation. Coming to the Lahore High Court, we find two conflicting decisions of Division Benches on the point in *Ajudhia Parshad*

1. (1895) I L R 22 C 981.
2. (1905) 8 C L J 308.
3. (1902) I L R 24 A 464.
4. (1903) I L R 25 A 280.
5. (1916) 14 A L J 610.
6. (1912) I L R 34 A 592.
7. (1915) I L R 37 A 456.
8. (1924) I L R 47 A 121.
9. (1925) 23 A L J 656.

v. *Imam-ud-din* (10) and *Sundar Singh* v. *Nighaiya* (11), the later decision not even noticing the former. We must observe that the ground on which some of the decisions are distinguished in the last case as being cases of revision is hardly acceptable, as the ratio of these decisions is that as those orders can be questioned in the appeal from the ultimate decree, there is another remedy open to the aggrieved party and the High Court will not therefore interfere in revision. Again in Bombay the principle of the decision in *Balabai* v. *Ganesh* (12) is not easily reconcilable with *Damodar* v. *Raghunath* (13) and *Chimanbhai* v. *Keshavlal* (14). Even in the Calcutta High Court where the restrictive interpretation of the terms of S. 105 originated in *Chintamony Dassi* v. *Raghoonath Sahoo* (1) the cases which have held that an order setting aside an award can be questioned under that section in the appeal from the decree passed on the merits of the suit cannot be reconciled with the other classes of cases. [Cf. *Ambica Dasia* v. *Nadyar Chand Pal* (15) and *Mothooranath Tewaree* v. *Brindabun Tewaree* (16)]. It is only in the Madras High Court all the decisions are uniform in the view that the terms of the section have to be read literally and without importing words which are not there. [See *Gopala Chetti* v. *Subbier* (17), *Achuthayya* v. *Thimmayya* (18) and *Shaik Aptab Shaha* v. *Moyan* (19)]. It may be mentioned here that the view that an order setting aside an *ex parte* decree or an order setting aside an abatement can be questioned in an appeal from the ultimate decree in the suit will not always result in a reversal of the order as it will oftentimes rest on the judicial discretion of the First Court with which the Appellate Court will not usually interfere. The argument based on the intention of the Legislature apart from the terms of the enactment is often not a very certain guide and loses much of its force in the face of the express provisions of S. 105 which has permitted orders to be questioned in the final appeal from the decree, although there may be no direct right of appeal from them. If it is permissible merely to speculate as to why no appeal is provided for from an order setting aside an *ex parte* decree or an abatement, it is possible to suggest that the Legislature might

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1. (1895) I L R 22 C 981.
10. (1922) 71 I C 587.
11. (1923) I L R 6 L 94.
12. (1902) I L R 27 B 162 at 187, 188.
13. (1902) I L R 26 B 551.
14. (1923) I L R 47 B 721.
15. (1885) I L R 11 C 172.
16. (1870) 14 W R 54.
17. (1903) I L R 26 M 604 : 13 M L J 308.
18. (1908) I L R 31 M 345 : 18 M L J 288.
19. (1916) 5 L W 266.

have contemplated that the trial of the suit should not be hung up for a long time by the pendency of an appeal at an interlocutory stage. Although we are inclined to think that the Madras view best accords with the well-known principles of the construction of statutes, it will be at least satisfactory that there should be no uncertainty in the law on the point in each one of the High Courts.

GAJADHAR MAHTON *v.* AMBIKA PRASAD TIWARI, I L R 47 All. 459 : 49 M. L. J. 238 (P. C.).

In this case a suit was brought on a mortgage executed by the manager of a joint Hindu family for realisation of the amount by sale of the mortgaged property. The suit was decreed in the first Court but was dismissed on appeal. On appeal to the Privy Council, a point was raised taht a personal decree should have been given on the personal covenant against the manager. Their Lordships say that the decree could not be given without an amendment of the plaint. In a properly drawn up plaint upon the mortgage, there would be a recital about the covenant and a claim for a personal decree for the balance after realising the mortgage security. On such a plaint it is difficult to see why the plaintiff, if found disentitled to the sale of the mortgaged property, should not get a decree on the covenant. In this case no such claim was apparently made. In fact, judging from the arguments before their Lordships, there was for a claim of that sort on the covenant a bar of limitation which had to be got over by reference to an acknowledgment apparently not relied upon in the plaint. In those circumstances obviously an amendment was necessary and their Lordships refused to permit it at such a late stage.

DIP NARAIN RAI *v.* LACHHMAN UPADHIYA, I. L. R. 47 All. 466.

After the preliminary decree for foreclosure in a mortgage suit and before the final decree the mortgagor died and one of his representatives was brought on record as legal representative and the decree was made absolute. The question was whether the decree bound the other representatives. The Court held it did. In somewhat similar circumstances under the old Civil Procedure Code, the Madras High Court held that the decree bound. In the event of the defendant dying, S. 368 of

that Code provided that the plaintiff may make an application to it specifying the name, etc., of the person whom he alleges to be the legal representative and the Court shall enter the name of such representative on the record in place of such defendant. From this, it was inferred in the case above referred to that the person so brought on record sufficiently represented the estate. It must be confessed that the reasoning is far from convincing but since, the Code has been amended and the Court is required to decide under O. 22, R. 5, as to who is the legal representative. In the absence of fraud or collusion, it seems to be clear now at any rate that a person whom the Court takes to be the legal representative would represent the estate and it is for a person who disputes the position to apply to the Court to be recognised as a representative under O. 22, R. 5. Under the old Code, there was a provision analogous to this only in the case of a deceased plaintiff's or appellant's representative but not in the case of a defendant's representative and even in such case the Court had a discretion to stay the suit pending the settlement of any dispute. Now the Court has no such discretion, so far as representation in the suit is concerned ; it has got to decide as to who is the representative. It would not bind the true representative from contesting the point in a regular suit but so far as the parties to such a suit are concerned the decision of the Court is conclusive and the remedy of the true representative is to sue the person who has been recognised by the Court for fruits of the decree if realised by him.

As to execution, we have a similar provision in S. 47. Civil Procedure Code. Here too, the Court had a discretion under the old Code either to determine the question itself or to stay execution till the question was determined by a separate suit. The same principles must govern questions arising in execution. See *Ramaswami Chettiar* v. *Oppilamani Chetti* (1).

There is no similar statutory provision in the case of suits against legal representatives but *Gnanambal Ammal* v. *Veerasami Chetty* (2) seeks to protect *bona fide* creditors obtaining decrees against persons in possession. On that question, however, there is a very considerable conflict of opinion in *Kaliappan Servaikaran* v. *Varadarajulu* (3) and *Padman* v. *Hanwanta* (4).

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1. (1909) I L R 33 M 6 : 19 M L J 671.

2. (1915) 29 M L J 698. 3. (1909) I L R 33 M 75 : 19 M L J 651.

4. (1915) 22 C L J 172 : 29 M L J 507 (P C).

PALANIAPPA *v.* SUBRAMANYA, I. L. R. 48 M. 553 : 48 M. L. J. 419.

This decision is of doubtful authority and does not seem to be consistent with *Muthiah Chettiar* v. *Ladd Govinddoss Krishnadoss* (1) which holds that O. 21, R. 16 is not exhaustive and persons not coming within that rule may yet be entitled to apply under S. 146, Civil Procedure Code, as persons "claiming under," here the transferee. See also *Ankalamma* v. *Chenchayya* (2).

RAVI NANDAN PRASAD *v.* JAGAR NATH SAHU, I L R 47 All 479.

The question in this case was as to whether an auction-purchaser is a person "whose interests are affected by the sale" within the meaning of O. 21, R. 90. The Madras High Court held in *Gopalakrishnayya* v. *Sanjiva Reddi* (3) that he was on the ground that the interests need not be those existing before the sale. That interpretation is undoubtedly somewhat violent. This case recognises that but suggests that the section does not require that the interest should be interest in the property. A person who is prejudicially affected by the sale is a person whose interests are affected by the sale and the auction-purchaser complaining that he was led into the bargain by false or inaccurate representation in the sale proclamation to his cost is such a person. The Patna High Court, on the other hand, in two cases has given expression to the view that the auction-purchaser's interests are not affected by the sale. The injury is a further qualification required and the interpretation suggested by the Allahabad High Court makes the section tautologous. On the interpretation suggested, the first part of the section would read "decree-holders, or injured persons can apply to to set aside the sale on the ground of irregularity provided they are injured by the irregularity complained of." It seems to make also a serious inroad on the doctrine of *caveat emptor* which has hitherto been regarded as the rule applicable to Court sales. Mr. Justice Sulaiman protests it is not but Mr. Justice Walsh's judgment furnishes the best answer to the contrary. It is a pity that the legislature could not pick its words with a little more care.

1. (1921) I L R 44 M 919 : 41 M L J 316.
2. (1917) I L R 41 M 637 : 34 M L J 315.
3. (1919) 38 M L J 228.

SARJU PRASAD *v.* MANGAL SINGH, I L R 47 A. 490.

The question in this case was as to whether the reversioners are permitted to challenge an alienation by the manager of a Hindu family which the junior members have failed to question during their life time but are not proved to have affirmed it. This case holds they can. They rely upon *Muhammad Muzamil-ullah Khan* v. *Mithu Lal* (1). There the Judges differ as to the grounds of the decision and a further point of distinction is that in that case the co-parceners themselves disaffirmed the alienation and sold the property to a third party. The assumption in the judgment of two of the Judges that the transaction is void seems to be opposed to the decision of the Privy Council in *Hanuman Kamal* v. *Hanuman Mandur* (2) and in subsequent cases that such sales are only voidable. *Subba Goundan* v. *Krishnamachari* (3), *Sankara Variar* v. *Ummer* (4) and *Bhirgu Nath* v. *Narsingh* (5). The decision seems to be opposed to the earlier decision of the same Court in *Jagesar Pande* v. *Deo Dat Pande* (6). It is opposed also to a decision of the Madras High Court in *Thayyil Mammad* v. *Purayil Mammad* (7). There is a judgment of the Privy Council in *Ujagar* v. *Pitam* (8) which sounds in the same sense. The way those cases look at the question is that it is an option and not property; of course if the option is exercised by the person entitled thereto, then it becomes a right or property which the heir would be entitled to inherit. The right to set aside a document or a contract on the ground of fraud though a right of a similar nature has been held to descend to heirs. The option to repudiate an alienation by the widow has been held to descend to the reversioner's heir and it is difficult to see on principle why the co-parcener's right to interdict should stand on a different footing.

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1. (1911) I L R 33 A 783 (F B).
2. (1891) I L R 19 C 123 (P C). 3. (1921) I L R 45 M 449 : 42 M L J 372.
4. (1922) I L R 46 M 40. 5. (1916) I L R 39 A 61.
6. (1923) I L R 45 A 654. 7. (1920) I L R 44 M 140 : 39 M L J 572
8. (1881) I L R 4 A 120 (P C).

GOPALA AIYANGAR *v.* EBRAHIM ROWTHER, I. L. R. 48 Mad. 509 : 49 M. L. J. 606 (F. B.).

This case deals with what we may call one of the subtleties of Election Law. It applies the decision of Kennedy and Darling, JJ. in *Hobbs* v. *Morey* (1) to Municipal election in Madras. What was decided in that case is—once a nomination has been accepted and an election takes place, the candidate that claims to be elected must have the *majority of votes*, otherwise, a fresh election should be ordered. The person that gets the minority of votes is not entitled to be declared elected from the mere fact that the only other candidate was disqualified. He is bound to show that he has the majority of votes. If any voters gave votes with knowledge that the candidate was disqualified, their votes may be disregarded. But if after striking off such votes, there should still remain majority in favour of the disqualified candidate, the only course open is to direct a re-election. If there is only one nomination, the Statute says that no election is necessary. If there is more than one nomination which is accepted, an election results and the candidate can be declared elected only if he gets majority of valid votes. We feel no doubt that the Court was right in directing a re-election. The only doubt one feels is about the question whether the Court has a right to strike off the votes of persons who knowingly voted for a disqualified person. Validity of English Municipal elections depends upon Common Law principles. Here we have a complete set of rules, and, it is very much to be doubted if the Court could add to the grounds for invalidating votes set out in the Act.

JODHA SINGH *v.* GOKARAN DAS PANDE, I. L. R. 47 A. 546.

This was an application of S. 151, Civil Procedure Code, on the lines suggested by the judgment of the Privy Council in *Debi Baksh Singh* v. *Habib Shah* (2). After a preliminary decree for sale the plaintiff applied for order absolute but the application was dismissed, as he was not present when the petition was called on. Subsequently on application to revive the former application, the Court cancelled the order of dismissal and passed a final decree. It was objected that the application was beyond the time prescribed for a review. The Court overruled the objection on the ground that it was passing an order under S. 151 as the Court had no

1. (1904) 1 K B 74. 2. (1913) I L R 35 A 331 : 25 M L J 148 (P C).

option but to pass the final decree under O. 34, R. 5 when an application was made to it in that behalf and the order passed was wholly irregular and the High Court upheld the order of the Lower Court. The rule as to dismissal for default of suits did not apply to the case and even the inherent power of Court to dismiss for default if one exists could not apply to a case where the Court had no option but to pass a final decree. Their Lordships of the Privy Council have recently laid down that the O. 17, R. 2 did not apply to suits after a preliminary decree has been passed. *Lachmi Narain Marwari* v. *Balmakund Marwari* (1). The same reasoning would preclude a dismissal for default of an application of the kind involved in the case. If the procedure adopted was inappropriate, the decision in *Debi Baksh Singh* v. *Habib Shah* (2) was an authority for recalling the order under S. 151.

KANHAIYA SINGH *v.* KUNDAN, I. L. R. 47 All. 561.

With deference we are afraid that here lurks some confusion of thought. The previous suit was brought to recover possession setting aside a sale which was held by the Court to be voidable and a decree had been passed in favour of the plaintiff on condition of his paying a certain amount within six months, in default of which the suit was to stand dismissed. The contract was voidable according to the decision of the Court and the plaintiff had avoided it and the Court had made certain order as to restitution of benefit. How after that, plaintiff could be permitted to sue for recovery of the price as if the sale was still intact, it is difficult to appreciate. The case presents no analogy to either *Mahomed Ibrahim* v. *Sheikh Hamja* (3) where on a suit for redemption having been dismissed on the ground that the mortgage set up was not proved a second suit for ejectment was brought or to *Veeranna Pillai* v. *Muthukumara Asary* (4), where on a suit for sale on a usufructuary mortgage having been dismissed on the ground that the document contained no covenant to pay, a subsequent suit was brought for recovery of possession. In both these cases the conclusion in the first suit was consistent with and led up to the second suit, whereas in the case under

1. L R (1924) 51 I A 321 : 47 M L J 441. (P C).
2. (1913) I L R 35 A 331 : 25 M L J 148 (P C).
3. (1911) I L R 35 B 507.
4. (1903) I L R 27 M 102 : 13 M L J 459.

review the conclusion in the first suit was inconsistent with the claim in the second. There could not be any question of ratification after the events that had happened.

GHUMMA *v.* RAMACHANDRA RAO, I. L. R. 47 All. 619.

Though the way in which the decision of the Privy Council in *Ram Sarup* v. *Bela* (1) is explained in this case is open to exception, the decision itself seems to be unexceptionable. A gift with an immoral condition differs in legal consequences from a gift for an immoral consideration. In the former case the gift is good and only the condition is void. In the latter the gift is bad. In other words, where there is an agreement between the donee and the donor that the former should fulfil an immoral condition, the gift is void and not merely the condition whereas in the case which their Lordships had to consider in *Ram Sarup* v. *Bela* (1) the donees were a woman and her minor children and any such agreement, at any rate with the children, being out of the question, their Lordships held that it was purely a case of gift with a condition and upheld the gift. In the case under review the woman donee was a major and was one of the parties to the conspiracy to procure the gift and it was in the contemplation of both parties that she should continue mistress of the donor. The distinction between the two kinds of cases is clearly brought out in *Thasi Muthukannu* v. *Shanmugavelu Pillai* (2).

INTERNATIONAL BANKING CORPORATION *v.* H. PESTONJI AND CO., I. L. R. 49 Bom. 351.

The necessity or otherwise of having to re-stamp a document by reason of a subsequent alteration of some of its terms although the alteration was made with the consent of all the parties thereto does not seem to have been considered in this country except by the Chief Court of Rangoon in *Tribeni* v. *Sahu* (3), although the law on the subject has been perfectly well settled in England for over a century. See *Bowman* v. *Nichol* (4). The general rule is that when a legally valid document is executed on an appropriate stamp paper, the stamp exhausts itself and when any alteration is subsequently

1. (1883) I L R 6 A 313 (P C). 2. (1905) I L R 28 M 413 : 15 M L J 286.
3. (1918) 50 I C 517. 4. (1794) 5 T R 537.

made although with the consent of parties, this is in effect a new document requiring a fresh stamp. This rule has been enacted in S. 14 of the Indian Stamp Act. This principle has been applied to the cases of bills and notes as in the case under notice. To this rule two exceptions have been recognised in the cases. The first, when the document as originally executed contains a mistake in its terms and does not bring out the original intention of the parties and the alteration is made only to correct the mistake and bring out the original intention. *Kershaw* v. *Cox* (1) and *Byrom* v. *Thompson* (2). The second is where the alteration is made before the bill or note is issued or becomes an available instrument, as in the case where a bill payable to the drawer's order is sent to the drawee for acceptance and he requested a longer time to be granted and an alteration to that effect is made before acceptance [*Kennerly* v. *Nash* (3)] or where an accommodation bill is altered before it gets into the hands of a holder for value. *Downes* v. *Richardson* (4) and *Scholfield* v. *Earl of Londesborough* (5). If however in the former case the bill was drawn to the order of another person as payee and delivered to him and an alteration is afterwards made but before acceptance, the bill would require a fresh stamp, as in this case it was a valid instrument before acceptance and the payee could have maintained an action on the bill against the drawer. *Walton* v. *Hastings* (6). It would seem that the two exceptions mentioned above are not exceptions in the strict sense of the term, as, in the one case it was a question of mere rectification and in the other no valid instrument was executed and issued before the alteration. Although these so-called exceptions are not specifically enumerated in S. 14 of the Indian Stamp Act, we believe that they would none the less be held applicable to this country equally. If the principle is as above stated it would make no difference in the case under notice if the time is taken to be extended under S. 63 of the Indian Contract Act or under S. 62, so long as it was not the original intention of the parties when the document was executed.

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1. (1800) 3 Esp 246.
2. (1839) 11 A & E 31.
3. (1816) 1 Stark 452.
4. (1822) 5 B & Ald 674.
5. (1894) 2 Q B 660.
6. (1815) 4 Camp 223.

PRABHAT CHANDRA BARUA *v.* EMPEROR, I. L. R. 52 Cal. 546.

On the main question decided in this case that a decision of a Judge of the High Court on a reference under S. 66 of the Indian Income-tax Act of 1922 is not a "judgment" within the meaning of cl. 15 of the Letters Patent of the Calcutta High Court and is consequently not appealable, the view of the learned Judges is in accord with that of the Lahore High Court in *Bulaqi Shah* v. *Collector of Lahore* (1) although the basis of the judgment of the Privy Council in *Tata Iron and Steel Company, Limited* v. *Chief Revenue Authority of Bombay* (2) on which both the High Courts found themselves is not quite clear. We are not sure that any different conclusion will be come to even if the definition of "judgment" adopted in *Tuljaram Rao* v. *Alagappa Chettiar* (3) is applied to the case.

On the other point touched in the case that when two learned Judges differ in the decision of a case but are agreed as to whose judgment prevails, in an appeal under cl. 15 of the Letters Patent the correctness of the view as to which is the prevailing judgment is not open for argument, is a matter on which, with all respect to the learned Judges, we are by no means clear. It is difficult to find any distinction between such a case and any other case where the Judges composing the Division Bench are agreed on some points but differ on others in which case on an appeal under the Letters Patent, it has been consistently held that even points agreed on by the learned Judges are open. [See *Upendra Nath Bose* v. *Bindesri Prasad* (4), *Gopeswar* v. *Hem* (5) and *Velji Bhimsey and Co.* v. *Bachoo Bhaidas* (6)]. On the reasoning of these cases we are inclined to think that although the Judges composing the Division Bench agree as to which is the prevailing judgment in a case where they have differed, this point on which they have agreed can be questioned in an appeal under S. 15 of the Letters Patent when the whole matter is open before the Appellate Court.

Coming to the question as to which is the judgment that prevails when two learned Judges differ on a reference under the Income-tax Act, the view of the learned Judges in *Emperor*

1. (1924) I L R 6 L 30. 2. (1923) I L R 47 B 724 : 45 M L J 295 (P C).
3. (1910) I L R 35 M 1 : 21 M L J 1 (F B). 4. (1915) 20 C W N 210.
5. (1920) 31 C L J 447. 6. (1924) I L R 48 B 691.

v. *Probhat Chandra Barua* (7) is, if we say so with respect, the one which is consistent with the provisions of cl. 36 of the Letters Patent and with the current of authority on the matter. As was pointed out by Sir John Edge in *Husaini Begam* v. *The Collector of Muzaffarnagar* (8) the provisions of cl. 36 are applicable in all cases which are not strictly appeals under the Civil Procedure Code to which alone the provision in S. 98 of the Code applies. A Full Bench of five learned Judges in *Bapu* v. *Bapu* (9) has held that cl. 36 of the Letters Patent applies to the case of a revocation of sanction under S. 195 (6) of the Criminal Procedure Code after having held that such a proceeding is not strictly in the nature of an appeal but a proceeding under a special jurisdiction. Very recently after a very elaborate examination of the authorities on this point the Madras High Court has held that even in cases falling under S. 25 of the Provincial Small Cause Courts Act if the Judges composing the Division Bench differ it is the view of the Senior Judge that prevails, though it can hardly be denied that the jurisdiction which the High Court exercises in such cases partakes of an appellate character. The nature of the jurisdiction by the High Court in cases of reference under S. 66 (2) of the Income-tax Act being of a special character as pointed out by the Privy Council in *Tata Iron and Steel Company, Limited* v. *Chief Revenue Authority of Bombay* (2), it can only be that to such a case the provisions of cl. 36 of the Letters Patent apply on the analogy of *Bapu* v. *Bapu* (9) referred to above.

ATMARAM SAKHARAM *v.* VAMAN JANARDHAN, I. L. R. 49 Bom. 388.

The question in this case is whether a donor has a *locus penitentiae* not to complete a gift of immoveable properties after an instrument of gift has been duly signed and attested and delivered to the donee and accepted by him but before the deed is registered. A majority of three learned Judges against two have held that the donor has no longer any right to recall the gift. Although, on principle, there may be much to be said in favour of the view of the dissenting Judges that an intending donor is entitled to resile from his intention to make a gift before it is perfected by the registration of the instru-

2. (1923) I L R 47 B 724: 45 M L J 295 (P C).
7. (1924) I L R 51 C 504. 8. (1889) I L R 11 A 176 at 182.
9. (1912) I L R 39 M 750 : 22 M L J 419 (F B).

ment, the line of distinction is very fine between this case and the class of cases where it has been held that a deed of gift may be presented for registration by the donee and registered notwithstanding the objection of the legal representatives of the donor or the donor himself and that the gift in such a case is a valid gift, as in the latter class of cases all that the donor or his legal representative intends by his objection is that he does not want to perfect the gift. If by objecting to the registration and thereby expressing his intention not to perfect the gift he cannot revoke the gift,—to use a loose expression—we do not see how it can be said that before the document is presented for registration it can be revoked by the donor after the instrument is signed and duly attested and delivered into the hands of the intended donee. It may be that it is open to the highest tribunal to hold that a deed of gift registered notwithstanding the objection of the donor would not make it a valid gift as the objection is nothing more than the expression of the intention not to perfect an imperfect gift. But, on the decisions of the several High Courts, the decision of the majority of the Full Bench in this case seems to be, with all respect, the only consistent view to take.

HAR PRASAD *v.* GULZARI LAL, I. L. R. 47 All. 604.

In this case the point was as to whether a covenant in a lease not to sell a grove when planted precluded a mortgage also. Their Lordships held that it did not. What would have happened if the mortgage resulted in a sale, their Lordships had not to consider.

GAJENDRA SINGH *v.* DURGA KUNWAR, I. L. R. 47 All. 637 (F. B).

The question in this case was as to the application of O. 23, R. 3 to awards on a reference pending suit. The majority hold that that section applies to such an award and that objections to the award such as can be urged in an application under R. 20 of the Schedule could also be urged when application is made under O. 23, R. 3. In this view it is somewhat difficult to understand the object of S. 89, Civil Procedure Code. There was a considerable amount of conflict on the question under the old Code and it is difficult to understand what the object of S. 89 could have been if it was not to settle the conflict and once for all lay down that the rules

contained in the schedule form a comprehensive code as to arbitration and if any case came outside it, there was no remedy. But that does not seem to be the effect of somewhat similar legislation in England. Both the Madras High Court in *Nanjappa* v. *Nanja Rao* (1) and the Bombay High Court in *Pragdas* v. *Girdhardas* (2) have taken the view that the provisions of the old Code as to reference had not that effect. The language of S. 89 might well be confined to references and attempts to enforce references and not held to extend awards at all. Even otherwise there is nothing in the Code or anywhere else to show that awards are illegal unless they satisfy the conditions of the schedule. S. 89 cannot be said to be incapable of yielding the conclusion favourable to the view of the majority. The rules do not provide for cases where not only the subject-matter of the suit but also other differences are intended to be settled as a part of the same arrangement or where the reference concerns not only parties to the suit but also other interested parties—cases which it could not be reasonably considered to have been struck at by the Code. This imperfection is an argument in favour of the view of the majority.

Mr. Justice Walsh refers to an inherent power of the Court to keep parties to their engagement which seems to be a somewhat strong procedure when the Code deals with the situation. In *Moonshee Amir Ali* v. *Maharanee Inderjeet Singh and others* (3) their Lordships of the Privy Council declined to hear an appeal when there was an undertaking by the appellant in the Lower Court for consideration that he would not appeal. But there, there was no complication of a reference and further, it was before the settled procedure of the Code.

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1. (1912) 23 M L J 290. 2. (1901) I L R 26 B 76.
3. (1871) 14 M I A 203.

FARID-UN-NISSA *v.* MUKHTAR AHMAD, I L R 47 All. 703 : 49 M. L. J. 758 (P. C.).

In this case, Lord Sumner summarises the effect of decisions relating to the transfer of property by purdanashin ladies. The plea in the case was one of undue influence by the husband and non-explanation of the contents of the document. Undue influence of the husband was found against ; approval of the draft was found and also reading out of the fair. Nevertheless, as the fair introduced substantial changes with respect to which there was no evidence that the attention of the lady was called to them and full explanation tendered, their Lordships held against the validity of the document. The discrepancy between the draft and the fair was a discovery before their Lordships and had not been referred to or commented on in the Lower Courts.

The rules relating to purdanashin ladies are to be distinguished from the headings, fraud, duress and undue influence which according to his Lordship are quite different matters. These rules are only special development which Indian social usages make necessary to the general rules of English Law which protect persons whose disabilities make them dependent upon or subject them to the influence of others, even though nothing in the nature of deception or coercion may have occurred. It is a part of the law relating to personal capacity to make binding transfers or settlements of property of any kind Independent legal advice is not essential. The real point is that the disposition must be substantially understood and must really be the mental act, as its execution is the physical act of the person who makes it. If the settlor's freedom or comprehension can otherwise be established or if the scheme and the substance of the deed clearly originated from her and if that scheme has been substantially carried out and embodied in the deed, failure to explain or want of proof of independent advice would not matter. If the settlor really understands and means to make the transfer, it is not required that some one should have persuaded her to the contrary. The burden of proving her state of mind is on those who set up and rely on the deed. Mere execution by such a person although unaccompanied by duress, protest or obvious signs of misunderstanding or want of comprehension, is in itself no real proof of a true understanding mind in the execution. Evidence to establish such comprehension is most obviously to be found in

proof that the deed was read over to the settlor and, where necessary, explained. If it is in a language not known to her, it must be translated and explained. The extent and character of the explanation necessary will depend upon the circumstances. Length, intricacy, the number and complexity of the dispositions or the unfamiliarity of the subject-matter are all reasons for requiring an increased amount and efficiency of explanation. If the matter is one not likely to attract attention, her attention should be specially directed to it. If there is a discrepancy between the original scheme laid down by her and the scheme as carried out by the deed, the discrepancy should be clearly pointed out to her and explained unless it must have been obvious even to one in her position. In the absence of such explanation, the question would be whether the explanation if given might have affected her mind in completing the deed. The doctrine cannot be pushed so far as to demand the impossible. The mere declaration by the settlor subsequently that she did not understand what she was doing is obviously not conclusive on the question. The whole question is whether having regard to the proved personality of the settlor, the nature of the settlement, the circumstances under which it was executed, the whole history of the parties, it is reasonably established that the deed executed was the free and intelligent act of the settlor or not. If it is, the onus of those relying on the deed is discharged.

IN THE MATTER OF BEGG SUTHERLAND & CO., LTD., I. L. R. 47 All. 715.

In this case a registered firm was converted into a company. Section 3 directs that the income-tax is chargeable on the previous year's income. Section 26 says that where any change occurs in the constitution of a firm or where any person has succeeded to any business, etc., the assessment shall be made on the firm as constituted or on the person engaged in the business at the time of the making of the assessment and on language quite similar, the House of Lords in *Wankie Colliery Co.* v. *Inland Revenue Commissioners* (1) has held that the new company it is that is liable to pay the excess profits tax in respect of both the profits of the old firm and the new firm. Section 55 of the Act makes an additional income-tax leviable from the company, firm, etc., known as super-tax. The firm was not liable for super-tax, the

1. (1922) 2 A C 51.

liability being on individual members. The question was whether the company was liable to pay super-tax on that income also. Apparently the argument of the learned Judges is that the income of the firm is not the income of the company or that the company cannot be held liable for something for which the firm was not liable. The point of distinction between the excess profits dealt with by the House of Lords' case and the case in hand is that the section dealt with specifically the excess profits and made the tax leviable from the person in charge of the business. Under S. 55, the profits of the registered firm were not chargeable at all so that there is no question of the tax being assessed at all in respect of them and there is no comprehensive statement that for the purposes of the Act, the income of the firm must be regarded as the income of the successor. The conclusion so that of the learned Judges seems to be right.

RAJA DEVI *v.* MUHAMMAD YAQUB, I. L. R. 47 All. 738.

A contract for sale of a future crop of fruit, this case holds, is a contract with regard to moveable property and as such does not require registration. The question in all such cases is as to whether it is intended to create a present transfer of an interest in immoveable property or it is merely a contract with regard to non-existent moveable property. If it is the former, it would require registration. The former kind of contract has all the infirmities of a mere contract relating to moveable property; the latter has the permanence and irrevocability of a transfer of immoveable property. The test as to whether the contract relates to moveable or immoveable has been the subject of several decisions [*see*, for instance, *Seeni Chettiar* v. *Santhanathan Chettiar* (1), *Gnanamuthu Nadar* v. *Veilukanda Nadathi* (2) and *Sukry Kurdeppa* v. *Goondakull Nagireddi* (3)]. Future crops are non-existent property and when they come into existence, they are moveable according to the definition given in the Registration Act.

RAMPUR GOSHAIN *v.* RAMDHARI BHAGAT, I. L. R. 47 All. 770.

There is a certain amount of conflict first as to whether in suits under S. 92, Civil Procedure Code, alienees can be made parties; secondly, as to whether an adjudication therein

1. (1896) I L R 20 M 58 : 6 M L J 281 (F B).
2. (1923) 19 L W 494.
3. (1871) 6 M H C R 71.

made will bind them; thirdly, as to whether any relief can be given against them.

In *Asain Raghavalu Setty* v. *Pellati Sitamma* (1) Wallis, C. J. was of opinion that they could not be made parties while Seshagiri Aiyar, J. seemed to think that they were proper parties though both of them agreed that no relief could be given against them. On this last question, the Madras High Court has taken a consistent view that no relief, such as possession or declaration of invalidity of alienation, can be granted against them [*Rangayya Naidu* v. *Chinnaswami Aiyar* (2) and *Malkajigunda* v. *Ramaswami Chettiar* (3)] though in *Subramania Aiyar* v. *Venkatachala Vadhyar* (4) it was held that a declaration that the property was trust property could be properly made. In Calcutta, in *S. Raja Chowdhuri* v. *G. Mohun Das Baishnav* (5) a very liberal view of the section was taken as enabling the Court to adjudicate against the validity of alienations, etc., but in *Budh Singh Dudhuria* v. *Niradbaran Roy* (6) this view is dissented from, Mr. Justice Mukherjea going so far as to hold that the alienees were not proper parties at all. In Bombay, in *Collector of Poona* v. *Bai Chanchalbai* (7) it is held that a person having an adverse interest may be a proper party though he cannot be ejected. In Allahabad, the view has been that the alienees are proper parties and that a declaration that the property is trust property and that the alienation is bad may be given but that a decree in ejectment cannot be made [*Ghazaffar Husain* v. *Yawar Husain* (8)] and that view has been accepted in the case under review. That seems also to be the view taken in *Mufti Ali Jafar* v. *Fazal Husain Khan* (9). There is much to commend the view of the Allahabad High Court in that much circuity of action is thereby avoided. After a declaration of invalidity of the alienation what remains in a suit for ejectment is very little and except where limitation comes in the way, it is not very likely that a suit will be found necessary at all to reduce the property into possession.

[END OF VOLUME XLIX]

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1. (1914) 27 M L J 266
2. (1915) 28 M L J 326.
3. (1923) 78 I C 950.
4. (1916) 4 L W 444.
5. (1897) I L R 24 C 418.
6. (1905) 2 C L J 431.
7. (1911) I L R 35 B 470.
8. (1905) I L R 28 A 112.
9. (1922) I L R 44 A 622.

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NOTES OF RECENT CASES.

PRIVY COUNCIL.

7th May.—*Mst. Bhagwani Kunwar & another* v. *Mohan Singh & others.*

Judgment delivered, dismissing the appeal.

7th & 8th May.—*Mst. Farid-un-nissa* v. *Mukhtar Ahmad & another.*

Hearing resumed and concluded ; judgment reserved.

7th & 8th May.—*Jacob* v. *Wills* (Bengal—Appeal No. 120 of 1924).

This, probably the first breach of promise appeal ever heard by the Privy Council, arose out of the action of Mrs. Lucia Jacob (*nee* Streek), a lady of German orgin and widow of a Barrister of Fyzabad and Lucknow, who alleged that, about October, 1915, the respondent, an assistant in the firm of Heilgers & Co., promised to marry her at the conclusion of the war. She was interned by the British Government during the war, and, after her release in August, 1920, she sued the respondent in the High Court, and recovered Rs. 35,000 damages, but her suit was dismissed on appeal on the ground that the engagement had been terminated.

L. de Gruyther, K. C. and *E. B. Raikes* for appellant.

F. T. Barrington Ward, K. C. and *S. Hyam* for respondent.

Judgment reserved.

8th & 11th May.—*Maung Bya & another* v. *Maung Kyi Nyo & others* (L. Burma—Appeal No. 106 of 1924).

The question here is whether, in Burma, a lower agricultural owner is liable to compensate a higher agricultural owner for damage to crops by inundation caused by the blocking of a canal running through the lands of the lower owner, by which the water would otherwise have been drained from the land of the higher owner.

Hon. G. Lawrence, K. C. and *E. F. W. Besley* for appellants.

E. A. Harney, K. C. and *R. W. Leach* for respondents.

The hearing is not concluded.

CORAM : *Lord Sumner, Lord Blanesburgh, Sir John Edge, Mr. Ameer Ali and Lord Salvesen.*

8th, 11th & 12th May.—*Lal Bahadur & others* v. *Ambika Prasad & another* (Oudh—Appeal No. 15 of 1924).

The question here is whether the sale on the 12th September, 1904, by two brothers, Pateswari Din and Ram Din, to the appellants of a 4-anna share in the estate of a Hindu family governed by the Mitakshara Law was binding on the respondents, who are members of the family and grandsons of Ram Din. The Subordinate Judge had answered this question in the affirmative, but the Judicial Commissioners had taken the opposite view.

A. M. Dunne, K. C., S. Hyam and *B. N. Srivastava* for appellants.

L. de Gruyther, K. C. and *J. M. Parikh* for respondents.

Judgment reserved.

12*th* and 14th May.—*Mata Prasad & another* v. *Nageshwar Sahai & others* (Oudh—Appeal No. 27 of 1924).

The appellants here claim to inherit two estates belonging to Narindra Bahadur, who died on the 18th June, 1905. The respondents' case is that the deceased left a will, dated the 21st October, 1904 (which was held genuine by the Privy Council, *see* L. R. 41 I. A. 78) authorising his widow to adopt a son.

A. M. Dunne, K. C. and *W. Wallach* for appellants.

L. de Gruyther, K. C. and *J. M. Parikh* for respondents.

The hearing is not concluded.

CORAM : *Lord Sumner, Lord Salvesen and Sir John Edge.*

13th May.—*K. Vijayaratnam & another* v. *M. Sudarsana Rao & others* (Madras—Appeal No. 62 of 1923).

The main questions here are whether the will, dated the 1st October, 1906, of the appellants' father, who died a minor on that date, comes under S. 17 (3) of the Registration Act (III of 1877) and whether the authority to adopt contained in that will is valid.

S. Hyam and *B. N. Srivastava* for appellants.

W. Ingram for respondents.

The hearing is proceeding.

13th May.—*Aguilar* v. *K. Gangananda Singh & others* (Appeal No. 126 of 1922).

Judgment delivered, allowing the appeal.

CORAM : *Lord Atkinson, Lord Shaw and Lord Darling.*

21st May.—*Sri Kanchumati V. S. Chandra Row* v. *Kanchumati Raju & others* (Madras—Appeal No. 92 of 1924).

In this suit by the appellant for the possession of certain properties, the final decision depended upon whether the alleged adoption of Respondent by the junior widow of Kanchumati Subbaya as his son was valid.

W. H. Upjohn, K. C., J. M. Parikh and T. C. K. Kurup for appellant.

L. de Gruyther, K. C. and *K. V. L. Narasimham* for respondents.

Judgment reserved.

CORAM : *Lord Sumner, Sir John Edge, Mr. Ameer Ali and Lord Salvesen.*

21st & 22nd May.—*Monghibai & others* v. *Pragji D. Hariani* (Bombay—Appeal No. 112 of 1923).

This appeal questioned the sane state of mind of Vassonji Madhavji, a wealthy Hindu, who died on the 21st November, 1919, having two days previously made his will while ill in a house of ill-fame in Bombay. The Indian Courts had granted Probate to the respondent.

Sir J. Simon, K. C., L. de Gruyther, K. C., Sir G. Lowndes, K. C. and G. D. McNair for appellants.

F. Luxmoore, K. C. and *E. B. Raikes* for respondents.

Appeal dismissed.

CORAM : *Lord Atkinson, Lord Shaw and Lord Darling.*

21st & 25th May.—*Hira Bibi & others* v. *Ram Hari Lall* (Patna—Appeal No. 6 of 1924).

The question here is as to the validity of a mortgage, dated the 17th August, 1916, which the defendants (appellants) contend is not duly attested as required by the Transfer of Property Act, S. 59 ; whereas the plaintiffs argue *inter alia* that the decisions of the Privy Council in 39 I. A. 218 and 45 I. A. 94 cover the case.

L. de Gruyther, K. C. and *W. Wallach* for appellants.

Sir G. Lowndes, K. C. and *E. B. Raikes* for respondents.

Judgment reserved.

22nd and 25th May.—*Burn & Co.* v. *H. H. the Thakur Sahib of Morvi* (Bengal—Appeal No. 134 of 1924).

The Thakur Sahib, who owns the Morvi State Railway, sued the appellant firm of Engineers for damages for (*a*) conversion of 42 wagons or alternatively, (*b*) for breach of contract to deliver the said 42 wagons, and to refund Rs.15,833 deposited with them under the said contract. The High Court had awarded the plaintiff Rs.1,37,739 as damages with interest and costs.

A. M. Dunne, K. C. and *Sir R. Aske* for appellants.

Sir G. Lowndes, K. C. and *T. J. O'Connor* for respondent.

Judgment reserved.

22nd and 25th May.—*Maung Bya* v. *Maung Kyi Neo & others.*

Hearing resumed and concluded ; judgment reserved.

22nd May.—*Sura Lakshmia Chetty & others* v. *Kothandarama Pillay.*

Judgment delivered, allowing the appeal.

25th May.—*Mir Subhan Ali* v. *Imami Begum & others.*

Judgment delivered, dismissing both appeals.

A. de M.

PRIVY COUNCIL.

25th May.—*Mata Prasad and another* v. *Nageshar Sahai and others.*

Hearing resumed and concluded ; judgment reserved.

CORAM : *Lord Blanesburgh, Sir John Edge* and *Mr. Ameer Ali.*

25th May.—*Skipp* v. *Kelly* (Bangalore).

Lilian Mildred Kelly, a governess, sued T. C. W. Skipp in the District Court, Bangalore, for damages for breach of a contract to marry her, and claimed one and a half lakhs of rupees. She was awarded half a lakh, which, however, was, on appeal, reduced by the Court of the Resident of Mysore to Rs. 15,000. Both parties thereupon obtained certificates under S. 110, Civil Procedure Code, 1908, for appeal to the Privy Council, and the defendant's appeal has already been listed. The plaintiff now petitioned for leave to cross-appeal *in forma pauperis.*

Yule for petitioner.

Petition granted.

CORAM : *Lord Blanesburgh, Sir John Edge* and *Mr. Ameer Ali.*

25th May.—*Ganesh Narayan Sah Deo* v. *Manik Lal Chunder* (Patna—Appeal No. 129 of 1924).

The appellant (judgment-debtor) attacked as irregular and illegal the sale in execution by the respondents 1 to 5 of his share in purganna Barwe to the 6th Respondent.

Sir G. Lowndes, K. C. and *W. Wallach* for appellant.

A. M. Dunne, K. C. and *T. B. W. Ramsay* for respondents 1 to 5.

Appeal dismissed with costs to both sets of respondents.

CORAM : *Lord Shaw, Lord Blanesburgh, Sir John Edge* and *Mr. Ameer Ali.*

26th May.—*Mst. Nag Kuer* v. *Shan Lal Sahu and others* (Patna—Appeal No. 98 of 1923).

The appeal arose out of a decree for dissolution of a partnership and disputed the propriety of certain detailed

directions for distributing the partnership assets which the plaintiff (appellant) alleges were not warranted by the terms of the preliminary decree of the 15th August, 1916.

A. M. Dunne, K. C. and *W. Wallach* for appellant.

S. Hyam for respondents.

Judgment reserved.

11th June.—*K. Vijayaratnam and another* v. *M. Sudarsana Rao and others.*

Judgment delivered ; appeal allowed.

CORAM : *Lord Phillimore, Lord Carson* and *Sir John Edge.*

11th June.—*R. Ganesh Narain Sahai and another* v. *Maharaja of Chota Nagpur* (Patna—Appeal No. 30 of 1923).

The appellants who were sued by the respondent for recovery of possession of purganna Barwe on the ground that Raja Raghubar Sahai, their father, had been tenant thereof as a jagir for life only, defended the action by claiming that it was an impartible estate of their family from time immemorial.

Sir G. Lowndes, K. C. and *W. Wallach* for appellants.

A. M. Dunne, K. C. and *T. B. W. Ramsay* for respondents.

Appeal dismissed with costs.

CORAM : *Lord Phillimore, Lord Carson* and *Sir John Edge.*

11th June.—*Homeshwar Singh and others* v. *Jugal Kishore Marwari and another* (Patna—Appeal No. 32 of 1924).

These were cross-appeals arising out of the High Court decree for Rs. 200,000, damages for breach of contract, awarded to the respondents, two contractors, who had agreed on the 23rd May, 1915, to fell the trees and make sleepers from the timber in the forest belonging to the appellants' father.

L. de Gruyther, K. C. and *S. Hyam* for appellants.

A. M. Dunne, K. C., K. Brown and *G. D. McNair* for respondents.

Judgment reserved.

CORAM : *Lord Phillimore, Lord Carson* and *Sir John Edge.*

11th June.—*Mst. Allah Jawai and others* v. *Mst. Sat Bhara and others* (Lahore).

The petitioners applied for special leave to appeal against the decree of the Subordinate Judge, Jhang (Nov. 1917) and the High Court, Lahore (17th March, 1924) setting aside a *tamliknama* of the 8th June, 1907, and giving possession of the property comprised therein to the respondents.

W. Wallach for petitioners.

Petition dismissed.

CORAM : *Lord Phillimore, Lord Carson* and *Sir John Edge.*

12th June.—*Bhupendra Narayan Singh* v. *Narapat Singh* (Bengal—Appeal No. 170 of 1924).

The question here is whether the respondent is entitled to *khas* possession of *chowkidari chakran* lands unconditionally or only upon payment of additional rent to the appellants.

Sir G. Lowndes, K. C. and *B. Dube* for appellant.

L. de Gruyther, K. C. and *R. H. Hodge* for respondent.

Judgment reserved.

12th June.—*Nowroji R. Wadia* v. *Government of Bombay.*

Judgment delivered ; appeal dismissed.

15th June.—*Jacob* v. *Wills.*

Judgment delivered ; appeal allowed.

CORAM : *Lord Shaw, Lord Carson, Sir John Edge* and *Mr. Ameer Ali.*

15th, 16th & 18th June.—*Sourendra Mohan Sinha and others* v. *Hari Prasad Sinha and others* (Patna—Appeal No. 136 of 1924).

In this suit for a mortgage decree, the Subordinate Judge, Bhagalpur, made a preliminary decree for sale for Rs. 15 lakhs and a personal decree for Rs. 44,164, while the High Court varied these by passing a decree for about Rs. 4 lakhs, and a personal decree for Rs. 23,181. Both parties have appealed, and the appeals have been consolidated. The plaintiffs contend that the High Court misapplied S. 6 of the Sonthal Parganas

Settlement Regulation III of 1872, as amended by Regulation V of 1893, in calculating interest; and the defendants *inter alia* claim that the whole case is *res judicata* because the plaintiffs' former suit in 1904 on the same mortgage was dismissed (*see* 41 I. A. 197).

L. de Gruyther, K. C. and *S. Hyam* for appellants.

Sir G. Lowndes, K. C. and *E. B. Raikes* for respondents.

The hearing is proceeding.

CORAM : *Lord Haldane, Lord Wrenbury* and *Lord Blanesburgh.*

16th & 18th June.—*S. Sundara Rajan and others* v. *C. M. Natarajan and others* (Madras—Appeal No. 140 of 1923).

This appeal relates to the construction and validity of the will, dated 27th April, 1897, of C. Ratna Mudaliar, who died in 1904.

A. C. Clauson, K. C. and *K. V. L. Narasimham* for appellants.

W. H. Upjohn, K. C., Sir W. Schwabe, K. C. and *A. M. Talbot* for respondents.

The hearing is proceeding.

18th June.—*Sourendra Mohan Sinha and others* v. *Hari Prasad Sinha and others.*

Hearing concluded ; judgment reserved.

18th June.—*S. Sundara Rajan and others* v. *C. M. Natarajan and others.*

Hearing concluded ; judgment reserved.

18th June.—*Burn & Co., Ltd.* v. *Thakur Sahib of Morvi.*

Judgment delivered ; appeal dismissed.

CORAM : *Lord Shaw, Lord Carson, Sir John Edge* and *Mr. Ameer Ali.*

18th June.—*Mahabir Prasad Tewari* v. *Jamuna Singh and another* (Patna—Appeal No. 92 of 1923).

This appeal relates to the title to the village of Bhariarpur.

E. B. Raikes for appellant.

B. Dube for respondent.

Judgment reserved.

CORAM : *Lord Shaw, Lord Carson, Sir John Edge* and *Mr. Ameer Ali.*

18th June.—*Bhupendra Narayan Singh* v. *Madar Buksh Sheikh and others* (Bengal—Appeal No. 63 of 1923).

The appellant, who is the Zemindar of a *putni* tenure, which was sold for arrears of rent on the 15th May, 1914, under the provisions of Bengal Regulation VIII of 1819, appeals against the judgment of the lower Courts, which have held that the notices of sale were not published in strict accordance with sects. 8 and 10 of the above Regulation, and that the sale of the *putni*, in so far as it affects the 1st respondent (now deceased), is invalid and ought to be set aside.

Sir G. Lowndes, K. C. and *B. Dube* for appellant.

The respondents were not represented.

The appeal is proceeding.

A. de M.

HIGH COURT.

Venkatasubba Rao and Reilly, JJ. *13th July*, 1925. — *C. R. P. No.* 311 *of* 1924.

Madras Local Boards Act (*XIV of* 1920), *S.* 56 (1) (*h*) *and* (4)—*Calculation of period—How to be made—No meeting held in a month—Wrong ruling of President under sub-sec.* 4—*Effect of.*

The period of three consecutive months referred to in S. 56 (1) (*h*) of the Madras Local Boards Act must be held to date from the day of the meeting in the month, which the member of the Local Board did not attend, though it may be that he attended an earlier meeting of the Board in the same month. For the purposes of cl. (*h*) even a month in which there was actually no meeting of the Board could be taken into calculation.

An erroneous ruling of the President that a member had not vacated his seat and that therefore there was no necessity to report the matter under S. 56 (4) does not in any way affect the statutory disqualification under S. 56 (1) (*h*).

K. S. Champakesa Aiyangar for Petitioner.

O. Thanikachelam Chetty for Respondent.

T. S. V.

Phillips, J.
14th July, 1925. } *S. A. No.* 1708 *of* 1922.

Limitation Act, Art. 11-*A—Mortgage by one member of joint Hindu family—Sale in pursuance of mortgage decree—Issue of sale certificate relating to whole property—Obstruction in getting delivery—Petition for removal of obstruction—Dismissal—Effect of—Suit by purchaser to recover mortgagor's share after effecting partition—Limitation—S.* 47, *Civil Procedure Code, if a bar.*

A member of a joint Hindu family mortgaged his share in a property to another, who obtained a decree thereon and had the property sold. Both in the sale proclamation and the sale certificate issued to the purchaser, what was sold was described as the whole property. The purchaser was obstructed in his attempt to obtain delivery and applied for the removal of the obstruction. His petition was dismissed, and, more than a year thereafter, he sued for recovering the mortgagor's share in the property after effecting a partition. *Held*, the relief asked for in the suit was not the same as that asked for in the application for removal of obstruction, and the dismissal of the latter did not affect his right to the mortgagor's share and as he was not bound to have the order set aside, his suit was not barred under Art. 11-A, Limitation Act. 12 L. W. 408 (P. C.) explained; *held* also, as the Court could not in execution enforce the auction purchaser's right to partition, the suit was not barred under S. 47, Civil Procedure Code. 29 Mad. 294 folld.; 26 Bom. 146 distd.; 19 A. L. J. 53 dissented from; 5 Bom. 25 referred to.

K. Rajah Aiyar and *V. Ramaswami Aiyar* for Appellant.

P. S. Narayanaswami Aiyar for Respondent.

T. S. V.

Jackson, J.
14th July, 1925. } *C. R. P. No.* 417 *of* 1923.

Indian Contract Act, S. 144—*Contract of guarantee—Two persons named in the body of the document as guarantors—But document executed only by one—Whether a condition of liability unless the other signed may be presumed—Condition to be proved.*

In the case of a contract of guarantee intended to be executed by more than one person, the executant who signs is liable unless he makes it a condition that he is to be liable only if the others also execute it. There is no presumption, merely because the document is worded so as to appear there will be several promissors, that the person actually executing it is not liable. 15 Halsbury, S. 901, p. 469 ; *Norton* v. *Powell,* 4 M. & G. 42 ; *Coyle* v. *Elphick,* 22 W. R. 541 at 543 followed. Ex parte *Harding,* 12 Ch. D. 557 at 566 distinguished.

G. Lakshmanna for Petitioner.

K. N. Rajagopal Sastri for *B. Satyanarayana* for Respondent.

Jackson, J.
15th July, 1925. } *C. R. P. No.* 913 *of* 1923.

Court Fees Act, S. 7 *(ii) as amended by Madras Act V of* 1922—*Suit for maintenance—Pauper application filed in* 1921 —*Leave granted after the amendment came into force—Suit decreed with costs—Liability of defendant to pay Court fee—Basis of payment—Plaint when deemed to be filed—Civil Procedure Code, O.* 33, *R.* 8.

An application for leave to sue *in forma pauperis* for maintenance was filed in 1921, but leave was granted only in June, 1922, after the Madras Act V of 1922 had come into force. The suit being decreed with costs, and the defendant having become liable to pay the Court fee on the plaint, the question arose whether he was to pay the amount as on a plaint filed in June, 1922, or as on the date when leave to sue was applied for ; *held,* as for purposes of the Limitation Act, the application for leave to sue as a pauper is deemed to be the plaint, so for the purpose of Court fee also the plaint must be deemed to have been filed in 1921 when the application was presented, and

hence the defendant was liable to pay the amount as on that date. O. 33, R. 8, Civil Procedure Code, referred to.

D. Ramaswami Aiyangar for *C. S. Venkatachari* for Petitioner.

The Government Pleader for Respondent.

T. S. V.

Venkatasubba Rao and Reilly, JJ.
16th July, 1925.
C. M. A. No. 216 of 1922.

Civil Procedure Code, S. 48 and O. 34, R. 5—Mortgage decree of 1907—Time for payment before 1908—Application for execution returned for obtaining final decree—Application under O. 34, R. 5—Judgment making order absolute, but final decree drafted —Execution application in 1921—If barred.

A mortgage decree was passed in 1907 and the time fixed for payment expired in the same year. When the decree-holder applied for sale in 1913, the same was returned on the ground that no final decree had been passed in the case. An application under O. 34, R. 5 was then put in and in 1917 the Court passed an order in terms making the decree absolute, but the decree that was drafted was one under O. 34, R. 5 and Form 10 of Appendix D. There was an infructuous execution proceeding within three years and in 1921 the mortgagee decree-holder again applied for sale, and then the judgment-debtor objected that as more than 12 years had passed from the date of the original decree, it had become barred under S. 48, Civil Procedure Code. *Held*, as there was on record, rightly or wrongly, a final mortgage decree and the conduct of the parties showed that the final decree it was that was being executed, it must be deemed that that was the decree that was under execution and it was not barred under S. 48, Civil Procedure Code.

S. T. Srinivasagopalachari for Appellant.

C. S. Venkatachari for Respondent.

T. S. V.

The Offg. Chief Justice and Viswanatha Sastri, J.
17th July, 1925.
O. S. A. No. 27 of 1925.

Letters Patent (Madras), cl. 15—Order refusing application to strike out pleadings—If a judgment—Appeal—Civil Procedure Code, O. 6, R. 16.

The order of a Judge on the Original Side refusing to strike out a portion of the pleadings alleged to be unnecessary or scandalous does not amount to a judgment within the meaning of cl. 15 of the Letters Patent and is hence not appealable. 3 L. W. 107; 35 Mad. 1 followed.

T. V. Muthukrishna Aiyar and *Mahomed Ibrahim Sahib* for Appellant.

V. S. Govindachar for Respondent.

T. S. V.

Phillips, J.
17th July, 1925. } *S. A. No.* 1701 *of* 1922.

Limitation Act, Art. 142—*Applicability—Suit for possession—Allegation of title and dispossession.*

Where a plaintiff sues for possession alleging that the title was in him, but that the defendants took unlawfully forcible possession from his vendor, Art. 142, Limitation Act, applies. 16 Cal. 473 (P. C.), 17 Cal. 137 (P. C.), 25 M. L. J. 95 (P.C.) followed; 39 Mad. 617 (P. C.), 7 C. L. R. 364 (P. C.), 21 C. W. N. 642 (P. C.), 44 Mad. 883 (P. C.), 39 Bom. 335, 21 L. W. 398 distinguished.

C. Narasimhachariar and *N. Sundaresa Aiyar* for Appellant.

S. Varadachariar for Respondent.

T. S. V.

Srinivasa Aiyangar, J.
21st July, 1925. } *C. S. No.* 98 *of* 1922.

Practice—Original Side, High Court—Taxation of costs—Witness resident more than 200 *miles from Court-house—Subpoena—Attendance without formal summons—Travelling expenses.*

Where a witness is resident more than 200 miles from the Court-house, and as such no summons could be issued to him, but at the request of a party he attends Court without a formal summons and gives evidence, his travelling allowances and batta can be allowed as part of the costs in taxation. In such cases parties should be encouraged to bring before the Court the witnesses on whom they rely rather than to take out a commission for their examination. But the costs of taking out

and serving a subpoena on such a witness will not be allowed, as no such subpoena should have been taken out at all.

A. V. Narayanaswami Aiyar for Plaintiff.

P. V. Sudarsana Raju for Defendant.

T. S. V.

Ramesam, J.

22nd July, 1925.

S. A. No. 84 *of* 1924.

Estates Land Act, Ss. 3 (2*e*), 53 (2), 144 *and Sch. A, No.* 15 *—Applicability of Act—Pleas not taken in written statement or in the Courts below—If to be allowed in second appeal—Whole village carved out of larger village—Premia paid—Adjustment towards arrears of rent—Limitation.*

The tenants of a holding sued under S. 112, Estates Land Act, stating there was no arrears of rent and if there were any, an amount paid by them as premium in ignorance of their legal rights should be credited towards the amounts due. The defendant pleaded in second appeal that the Estates Land Act did not apply, as he was himself the kudivaramdar but did not raise it in his written statement or in the Courts below. *Held,* it could not be allowed to be raised for the first time in second appeal. As it also appeared that the suit village was a village carved out of a larger village (the Arni Jagir) it was an estate under S. 3 (2*e*) and the Act applied. Scope of 44 Mad. 677 and 45 Mad. 716 explained. *Held also,* in any event, the attachment sought to be set aside would be valid to the extent of the arrears legally due and tenants after the expiry of the period of six months prescribed by No. 15 of Sch. A of the Act could not ask for an adjustment of the premium paid towards the arrears of rent due.

The Advocate-General and *M. S. Vaidyanatha Aiyar* for Appellant.

T. R. Subramania Aiyar for Respondents.

T. S. V.

Krishnan, J.
13*th July*, 1925. } *C. R. P. No.* 489 *of* 1923.

Vendor and purchaser—Payment of Government revenue by the vendor after sale—Patta continuing in his name—Suit to recover personally the amount from the buyer, whether lies.

Where the plaintiff who sold certain lands to the defendants and got a mortgage of the same properties for a portion of the purchase money paid the arrears of revenue due to the Government as the patta continued to stand in his name, sued to recover the amount so paid from the defendants personally, *held* that the suit was not maintainable in the Small Cause side inasmuch as the remedy of the plaintiff was only against the land and on the principle of subrogation he could only get a charge over the land which the Government had before such payment.

K. V. Srinivasa Aiyar for Petitioner.

R. Kuppuswami Aiyar for Respondent.

C. A. S.

Phillips, J.
13*th July*, 1925. } *S. A. No.* 1570 *of* 1922.

Practice and procedure—Second Appeal—Power of the High Court to interfere with the discretion of the Lower Appellate Court in admitting additional Evidence—Misconstruction of document by Lower Appellate Court.

Held distinguishing the Full Bench case in 42 Mad. 737 that it was open to the High Court in second appeal to interfere with the discretion of the Lower Appellate Court in the admission of additional evidence where the Lower Court's judgment is vitiated by misconstruction of a material document already on record.

T. Ramachandra Rao for Appellant.

V. Ramadoss for Respondent.

C. A. S.

Venkatasubba Rao and Reilly, JJ.
14*th July*, 1925. } *C. M. A. No.* 375 *of* 1923.

Provincial Insolvency Act of 1920, *S.* 53 *Voluntary alienation—Burden of proof that transfer was not in good faith or for valuable consideration—Onus on person alleging the same.*

N R C

Held, that the onus of proving that a transfer was not in good faith and for valuable consideration lies on the person alleging the same under S. 53 of the Provincial Insolvency Act.

B. Somayya for Appellant.

T. Ramachandra Rao for Respondent.

C. A. S.

Phillips, J.
22nd July, 1925. } *S. A. No.* 1660 *of* 1922.

Hindu Law—Reversioners—Dispute between presumptive and remoter reversioners during widow's life-time—Settlement by compromise each set of reversioners taking a share—Widow not asserting her title—Actual reversioner on widow's death suing to recover the properties allotted to the other parties to the compromise—Whether suit maintainable.

One S. died issueless in 1906 leaving him surviving a widow, a divided brother and a predeceased brother's sons also divided. The brother and the nephews both claimed *S's* property and their disputes were settled in 1907 by a compromise whereby the brother took two-thirds and the two nephews together took a third of the property. They were thus in possession and enjoyment of their respective shares till the widow's death in 1914. The brother of S. then brought the present suit against the nephews to recover the one-third in-their possession, claiming that he became entitled on the widow's death to the entire estate of S.

Held, that the transaction of 1907 was not a mere dealing in *spes successionis* as actual possession of the properties was taken and divided between the parties to the settlement; and that the plaintiff having been a party to that arrangement was precluded from now setting up his title as actual reversioner. 40 All. 487 (P. C), 35 M. L. J. 459 (P. C.) applied.

K. N. Rajagopal Sastri for *B. Satyanarayana* for Appellants.

Y. Suryanarayana for the Respondents.

Srinivasa Aiyangar, J.
22nd July, 1925. } *T. O. S. No.* 7 *of* 1921 *and* 7 *of* 1922.

Madras High Court Fees Rules, O. 6, R 63—Testamentary suit—Scale of fees to vakil.

In testamentary suits, the fee allowed to a vakil is on the basis of a reasonable fee, under R. 38 of the Pleaders' Fees Rules, as the subject-matter of the claim does not admit of valuation and no claim for a definite amount is put forth in the petition for probate, which is later registered as a plaint.

T. K. Srinivasathathachari for Applicant.

T. S. V.

Srinivasa Aiyangar, J.
22nd July, 1925. } *C. S. No.* 765 *of* 1921.

Madras High Court Fees Rules, O, 6, R. 63—Original Side—Vakils' fees—Suit withdrawn before case opened—Taxed costs of defendant—Scale of—R. 31 (*a*) *and* (*b*) *of Pleaders' Fees Rules.*

A plaintiff withdrew his suit on the Original Side of the High Court on the day of hearing before the case was opened, and it was dismissed with the taxed costs of the defendant. *Held* the case fell under R. 31 (*a*) of the Rules for the remuneration of pleaders and not under sub-clause (*b*). The full scale of fees ought to be allowed in taxation.

T. K. Srinivasathathachari for Defendant.

T. S. V.

Phillips, J.
23rd July, 1925. } *S. A. No.* 1720 *of* 1922.

Promissory Note—Malabar devaswom—Execution by uralars—If binds devaswom.

A promissory note was executed by the *uralars* of a Malabar *devaswom*, and the recitals stated that the executants as *uralars* were liable to pay and that the amount would be due from the *devaswom*. *Held*, a decree can be given against the funds of the *devaswom*, if the amount was borrowed for necessity. 45 Mad. 703 foll. ; 32 M. L. J. 259 and 33 M. L. J. 631 distd.

The principles of English law as to trustees do not apply to Malabar *uralars*.

B. Sitarama Rao and *K. P. Ramakrishna Aiyar* for Appellant.

K. P. M. Menon for Respondents.

T. S. V.

Ramesam, J.
23rd July, 1925. } *C. R. P. No.* 701 *of* 1923.

Madras Estates Land Act, Ss. 111 *and* 205*—Landholder's application for sale—Dismissal—If revisable by High Court—Sale if can be prevented by payment of person having no interest—Decision of Board of Revenue—Powers of High Court.*

A revision petition lies direct to the High Court against an order of a Revenue Court striking off a landholder's application for sale under S. 111 of the Estates Land Act. The Revenue Court is "subordinate" to the High Court, inasmuch as subsequent proceedings may follow by way of suits under S. 112, and the appeals therefrom lie to the Civil Courts. 42 Mad. 76 and 310 applied.

A person who has no interest in a holding cannot prevent a sale thereof by paying to the collector the arrears due from the defaulter. But where the landholder accepts such payment, it is not open to him to go back on such acceptance and insist on the sale proceeding.

Orders passed in revision by the Board of Revenue under the Estates Land Act are not revisable by the High Court. Where the Board has refused to interfere with the order of the Revenue Court, the High Court also will not interfere in revision against the same, unless there has been a gross miscarriage of justice. 47 Mad. 250 followed.

P. Somasundaram for Petitioner.

K. N. Rajagopala Sastri for *B. Satyanarayana* for Respondent.

T. S. V.

PRIVY COUNCIL.

19th June.—*Bhupendra Narayan Singh* v. *Madar Baksh Sheikh and others.* Hearing continued and concluded; appeal dismissed. [*See* p. 7.]

CORAM: *Lord Shaw, Lord Carson, Sir John Edge* and *Mr. Ameer Ali.*

19th June.—*Pramatha Nath Mulia* v. *Burton and others* (Patna—Appeal No. 103 of 1923).

The Respondent (Plaintiff) here claimed the sub-soil rights of mauza Kapsara, but the Appellants, besides denying his title thereto, pleaded that the suit was barred by limitation.

L. de Gruyther, K. C. and *B. Dube* for Appellants.

A. M. Dunne, K. C. and *K. Brown* for Respondents.

Appeal dismissed.

23rd June.—*Sri Kanchumarthi Venkata S. C. Row* v. *Kanchumarthi Raju and others.* Judgment delivered; appeal dismissed.

23rd June.—*Mst. Hira Bibi and others* v. *Ram Harilal and others.* Judgment delivered; appeal of first appellant allowed, of the other appellants dismissed. [*See* p. 4.]

29th June.—*Homeshwar Singh and others* v. *Jagal Kishore Marwari and others.* Judgment delivered; allowing the appeal, and dismissing the cross-appeal.

CORAM: *Lord Finlay, Lord Carson* and *Lord Blanesburgh.*

29th June.—*Dhanpat Rai and others* v. *Bhai Kahan Singh and others* (Lahore).

In this petition for special leave to appeal, the Petitioners were the Plaintiffs in a suit which they brought in July, 1917, for cancellation of a mortgage deed made on the 31st May, 1899 (and the proceedings consequent thereon) by Lachmandass, their father and grandfather, on the ground that it alienated their ancestral property without legal necessity. They ques-

tioned the application of S. 47 of the Civil Procedure Code, 1908, to the proceedings.

Sir G. Lowndes, K. C. and *G. D. Mc Nair* for Petitioners.

Leave granted.

CORAM : *Lord Finlay, Lord Carson* and *Lord Blanesburgh.*

29th June.—*Sarju Ram* v. *Oudh Behari Pande and others* (Allahabad).

The Petitioner, who was Defendant in a suit by the Respondents of an 8-anna share in village Bhatrindwa, which he claimed to have purchased *bona fide* and for value from the usufructuary mortgagee thereof, now applied for special leave to appeal. The Respondents alleged that the property was ancestral property and was sold without legal necessity, through undue influence, etc., and that the Petitioner had previous knowledge of these blots on the title.

W. Wallach for Petitioners.

Petition dismissed.

CORAM : *Lord Finlay, Lord Carson* and *Lord Blanesburgh.*

29th June.—*Bansilal Abirchand* v. *Ghulam Mahbub Khan and another* (Hyderabad, Deccan—Appeal No. 131 of 1924).

The Appellant sued the Respondent before the Civil Judge, Secunderabad, for Rs.58,000, money lent and secured by three bonds, dated 1891 and 1894, alleged to have been made by the late Mohd. Allauddin, deceased (grandfather of Respondent 1); for which the late Sir Asnam Jah (Prime Minister of Hyderabad, and father of Respondent 2) was surety. Exemption from the Limitation Act, 1898, is claimed by virtue of sect. 13, but the respondents plead that a British Court, like that of the Cantonment at Secunderabad, had no jurisdiction to hear the case, and that the proper *forum* was the State of Hyderabad.

Sir G. Lowndes, K. C. and *E. B. Raikes* for Appellant.

L. de Gruyther, K. C. and *B. Dube* for Respondents.

Judgment reserved.

30th June.—*Maung Bya and another* v. *Maung Kyi Neo*. Judgment delivered; appeal allowed, [*See* p. 1—2].

CORAM : *Lord Finlay, Sir John Edge, Mr. Ameer Ali* and *Mr. Justice Duff.*

30th June.—*Ma Chit Su* v. *National Bank of India, Ltd. and another* (Lower Burma—Appeal No. 123 of 1924).

This appeal arises out of an action by the Respondent Bank for specific performance (which both the Lower Courts have decreed) of a contract for the sale of premises No. 3, Phayre Street, and No. 62, 37th Street, at Rangoon.

G. Lawrence, K. C. and *E. F. W. Besley* for Appellants.

Sir G. Lowndes, K. C. and *E. B. Raikes* for Respondents.

Judgment reserved.

A. de M.

HIGH COURT.

Phillips and Ramesam, JJ. 22*nd July*, 1925. } *S. A. No.* 1171 *of* 1922.

Inam—Enfranchisement—Karnam service—Adverse possession—Effect of enfranchisement.

A grantee of *karnam* service inam lands after enfranchisement sued a person in possession for recovery of the same. The latter set up title by adverse possession, and it was contended for plaintiff that enfranchisement gave him a fresh title to sue and that the possession prior to enfranchisement did not count. *Held*, overruling the contention, that the ordinary 12 years' rule applied to the case and enfranchisement did not nullify the effect of the defendant's possession prior to it. 30 Mad. 245, 28 C.W.N. 66 folld. ; 46 M.L.J. 482 dissented from ; 48 M.L.J. 470 distd.

This decision was followed by *Jackson*, J. in S. A. No. 260 of 1923 decided on 30th July, 1925.

Y. Suryanarayana for appellant.

B. Jagannatha Doss for respondent.

T. S. V.

Devadoss and Waller, JJ. 24*th July*, 1925. } *C. M. S. A. No.* 55 *of* 1925.

Limitation Act, Arts. 180, 181—*Auction sale—Decree-holder purchaser—Application for delivery within* 3 *years of confir-*

mation of sale—Order for delivery—Subsequent application for delivery within 3 *years of order—If barred.*

An application for delivery of property by a decree-holder purchaser made more than three years after confirmation of the sale but within three years from the date of a prior order of Court directing delivery falls under Art. 180 and not under Art. 181 of the Limitation Act and is therefore barred. Opinion of *Oldfield*, J. in 43 I. C. 155 followed; view of *Abdur Rahim*, J. dissented from.

K. Kameswara Rao for appellant.

P. Satyanarayana for *P. Somasundaram* for respondent.

T. S. V.

Odgers and Madhavan Nair, JJ.
24th July, 1925. } *A. S. No.* 88 *of* 1922.

Civil Procedure Code, S. 92*—Interest— Mosque —Residence near—Effect.*

In the case of a Mahomedan mosque, mere residence near it is not sufficient interest within the meaning of S. 92, Civil Procedure Code.

Per Madhavan Nair, J.—Residence in or near the locality must be considered only as a fact from which an inference may be drawn as to the existence of an interest within the meaning of S. 92 9 L. W. 1 distd. ; 42 Mad. 360 considered and applied ; 47 Mad. 884 (P. C.) refd. to.

P. R. Ganapathi Aiyar for appellants.

S. Varadachariar and *M. S. Ramanuja Aiyangar* for respondents.

T. S. V.

Odgers and
Madhavan Nair, JJ. } *A. S. No.* 96 *of* 1922.
24th July, 1925.

Mortgage—Agreement to make an endorsement of discharge on prior promissory note—Mortgagee assigning pro-note for consideration to stranger—Failure of consideration—Merger—Principle when applies.

The defendant executed a hypothecation bond to the plaintiff directing the latter to make an endorsement of discharge on a promissory note executed to him before. Instead of so doing the plaintiff assigned the promissory note to one V. for consideration. In a suit by plaintiff on the hypothecation bond, ***held*** there was a failure of consideration as soon as the pro-note was assigned to V. and not when V. brought a suit on the note, got a decree and realised the amount from the defendant.

Held also, the doctrine of merger that a smaller security would *ipso facto* be extinguished when a greater security is taken would not apply to a case where the securities are in different hands.

K. V. Krishnaswami Aiyar and *K. G. Srinivasa Aiyar* for Appellants.

K. Rajah Aiyar and *R. Purushothama Aiyangar* for Respondent.

T. S. V.

Phillips and
Ramesam, JJ. } *S. A. No.* 1704 *of* 1923.
24th July, 1925.

Hindu Law—Partition—Rights of alienee from co-parcener—Equities to be pleaded—Decision when res judicata.

A suit for general partition by a stranger who has purchased a co-parcener's interest in some joint family properties should be filed before a non-alienating co-parcener brings a suit for partial partition. If in a suit for partial partition, the stranger purchaser does not set up the equities in his favour or his equitable rights are disallowed, that decision is final and conclusive as between the parties and will operate as ***res judicata*** in a subsequent suit filed by him for general partition. But such later suit is maintainable in law. Case-law referred to.

K. Sankara Sastri for Appellants.

N. Chandrasekhara Aiyar for Respondent.

T. S. V.

NRC

Phillips, J.
27th July, 1925. } *S. A. No.* 1798 *of* 1922.

Mortgage—Redemption—Time fixed for payment—On default mortgagee and his heirs to enjoy—Rule of strict construction.

A mortgage document executed in 1844 contained a clause that after 30 years in default of payment of the mortgage amount the mortgagee was to have the *kuduthala* changed in his name, he and his heirs were to enjoy the property from generation to generation, and the mortgagor and his representatives were not to have any right or interest thereafter. The amount was not paid within the stipulated time and subsequently a redemption suit was filed. *Held*, the strict construction of the contract ought to be given effect to, and the suit for redemption could not be maintained. 13 M. I A. 560 and 1 Mad. 1 followed.

C. V. Anantakrishna Aiyar and *K. Y. Adiga* for Appellants.

B. Sitarama Rao and *K. Sundara Rao* for Respondent.

T. S. V.

Odgers and Madhavan Nair, JJ.
27th July, 1925. } *L. P. A. No.* 4 *of* 1924.

Civil Procedure Code, S. 11—*Suit in ejectment alleging title as owner—Dismissal on oath—Subsequent suit for a share conceding share to defendant—If barred.*

A suit in ejectment by plaintiff's father against his brother was dismissed on the latter taking an oath that the properties were family properties. Subsequently in a suit brought by the sister's daughter of the defendant for her share under the Mahomedan Law, it was found that the properties belonged exclusively to the plaintiff's father and not to the whole family. The plaintiffs thereafter sued the defendant for recovering their share in the properties alleging the real ownership to be in themselves but conceding a share to the defendant in pursuance of his oath in the first suit. *Held*, the suit though brought for recovery of a share was not a suit for partition as between co-owners but one based on ownership and consequently it was barred by *res judicata*. 46 Mad. 135 folld. *Held* also, the dismissal of the suit filed by the sister's daughter did not bar the claim of other sisters who were co-defendants in that suit.

A. Krishnaswami Aiyar and *E. Vinayaka Rao* for Appellants.

K. V. Krishnaswami Aiyar and *N. Swaminathan* for Respondents.

T. S. V.

The Officiating Chief Justice and Viswanatha Sastri, J. *27th July,* 1925. } *O. S. A. No.* 33 *of* 1925.

Letters Patent, cl. 15—*Order of a Judge on the Original Side rejecting an application for review—Whether "judgment"—No appeal lies.*

The order of a Judge sitting on the Original Side rejecting an application for review is not a judgment within the meaning of cl. 15 of the Letters Patent and no appeal lies therefrom. Nor is it appealable under the Civil Procedure Code.

K. Rajah Aiyar for Appellant.

K. S. Narayana Aiyangar instructed by *Messrs. Grant and Greatorex* for Respondents.

C. A. S.

Jackson, J. *27th July,* 1925. } *C. R. P. No.* 872 *of* 1923.

Madras District Municipalities Act, Ss. 80, 92 *and* 354—*Collection by a Municipal Council of a sum as profession tax—Claim by the Council to retain the same as Company tax, after objection by the Company—Strict compliance with the statute incorporating public bodies necessary—Non-compliance with Ss.* 80 *and* 92—*Company entitled to refund—Suit for the same maintainable.*

Where a Municipal Council collected a sum of money from a Company as "profession tax" and on objection taken by the Company claimed to retain a portion of it as "Company tax" under the provisions of Madras Act V of 1920, *Held,* that Municipalities and public bodies should strictly comply with the provisions of the Act to which they owe their existence that there being no compliance with Ss. 80 and 92 of the Act there being no second publication as required by S. 80 the levy and retention were *ultra vires* and the jurisdiction of Civil Court to enquire into the legality of the levy was not ousted under the provisions of S. 354 of the Act. *Held* further,

that the retention as Company tax of amount originally collected as profession tax is also illegal. Suit by the Company for refund was consequently decreed.

T. Ramachandra Rao for Petitioner.

Y. Suryanarayana for Respondent.

C. A. S.

Venkatasubba Rao and Reilly, JJ. *30th July*, 1925. — *C. M. S. A. No.* 108 *of* 1923.

Civil Procedure Code, S. 146 *and O.* 21, *R.* 46—*Attachment before judgment of debt due to defendant—Decree obtained by defendant against his debtor—Recording of satisfaction—Rights of attaching creditor.*

L. to whom money was owed by R. was sued by a creditor X. who obtained an attachment before judgment of the debt due by R. Subsequent to the decree in the suit, L. sued R. for the money due, obtained a decree and reported satisfaction to the Court. X. then applied to execute his decree and the question was as to the effect of his failure to attach the decree obtained by L. against R. *Held*, per *Venkatasubba Rao, J.* (1) the attachment before judgment of the debt due to L. by R. fastened itself to the decree without any further act on the part of the attaching creditor. The debt having matured into and merged in a decree, the attachment gets transferred to the decree. 17 All. 210 (P. C.) referred. (2) X. can also invoke the aid of S. 146, Civil Procedure Code, and as a person claiming under L, can execute his decree. S. 146 should be construed liberally. 44 Mad. 919 referred to ; 51 Cal. 703 distinguished ; 1922 All. 98 dissented from. *Held*, per *Reilly, J.* (*contra*) (1) the attachment of the debt does not automatically transfer itself into an attachment of the decree and the execution petition must be amended by adding a prayer for the attachment of the decree, and (2) the mere recording of satisfaction was not a bar to attaching the decree in execution, where the act is done fraudulently and in the absence of the parties really affected by it. 6 Bom. 148 ; 27 M. L. J. 172 ; 14 M. I. A. 40 referred to Effect of attachment explained.

B. Sitarama Rao and *L. V. Krishnaswami Aiyar* for Appellant.

R. Ganapathy Aiyar for *K. Rajah Aiyar* for Respondent.

T. S. V.

Phillips, J.
30th July, 1925.
} S. *A. No.* 855 *of* 1922.

Limitation Act, S. 14—*Plaint filed in wrong Court—Order directing return of plaint—Plaint returned much later—Period of deduction—Computation—Proceedings when end—Civil Procedure Code*, O. 7, *R.* 10.

A suit for rent was originally filed in a Small Cause Court, but returned to be presented to a Revenue or Civil Court according as the lands formed an "estate" within the meaning of the Madras Estates Land Act or not. It was duly presented to the Civil Court and, after the lapse of a long time, the Court of Appeal decided that the Civil Court had no jurisdiction and directed the plaint to be returned for presentation to a Revenue Court. The plaint was actually returned about a month after the date of the appellate judgment. The question arose whether in calculating the period of exclusion under S. 14, the period between the date of appellate judgment and the actual return of the plaint should be included. *Held*, the proceedings can be said to have ended within the meaning of Explanation I only when the plaint is actually returned after complying with the provisions of O. 7, R. 10 and hence the period should be excluded. 3 M. L. J. 190 dissented from ; 7 M. L. J. 261 ; 22 Bom. L. R. 387 and (1887) A. W. N. 323 followed.

K. Bashyam Aiyangar and *A. Srinivasa Aiyangar* for Appellants.

A. Krishnaswamy Aiyar, M. Patanjali Sastri and *C. S. Rama Rao Sahib* for Respondents.

T. S. V.

Phillips and Ramesam, JJ.
31*st July*, 1925.
} *S. A. No.* 1076 *of* 1922.

Easements Act, S. 7, *Illns.* (*a*) *and* (*i*)—*Natural right—Right of owner of upper land to have surface-water flow down naturally on lower land—Whether owner of lower land has a right to protect himself by raising bunds.*

On account of the conflict between 29 Madras 539 and (1910) M. W. N. 545 on the one hand, and 38 Madras 149 and 28 M. L. J. 98 on the other, on the question whether the owner of a lower land has a right to prevent the surface water falling on an upper land from flowing naturally on to the lower

land by raising bunds or otherwise, their Lordships referred the above case to a Full Bench for decision.

V. Suryanarayana for Appellant.

B. Satyanarayana for Respondent.

Jackson, J.
31*st July*, 1925. } *S. A. No.* 18 *of* 1923.

Contract—Sale of goods—Performance of—Option to keep contract open—Exercise of—Estoppel.

A person entered into four different contracts with another to supply bales of yarn as and when he got them from the mills. Some bales were supplied and while another supply was being made, the buyer refused to take delivery on the ground of delay and also intimated that he would not accept the remaining bales either. The seller replied that he would keep the buyer bound by his contract, brought a suit for damages for non-acceptance, and again reiterated in the plaint that he would deliver the balance of the goods afterwards. The buyer stated in the written statement that he had already cancelled the contracts. The suit terminated in an award in favour of the seller. Subsequently, the buyer sued the seller for damages for not supplying the remainder of the goods. *Held*, (1) it was open to the promisee to keep the contracts open and subsisting and wait till the time for performance arrived or to treat the repudiation as a breach. L. R. 9 C. P. 208 followed ; (2) the seller by bringing his suit exercised such an option to repudiate notwithstanding his statement in the plaint that he would perform the remainder of the contract ; (3) even if the contracts were kept open, the buyer was estopped from contending that, as he had himself not accepted in his written statement the election by the seller (1919) 1 K. B. 78 followed ; and (4) as the buyer had intimated that he would not be bound by the contract, the seller was no longer liable to perform the contract. 7 Halsbury, p. 423, para 865 followed.

C. V. Anantakrishna Aiyar for Appellant.

S. Jagadisa Aiyar for Respondent.

T. S. V.

Jackson, J.
31*st July*, 1925. } *S. A. No.* 288 *of* 1923.

Hindu Law—Widow—Funeral expenses—Who to meet—Maintenance holder.

The funeral expenses of a deceased co-parcener's wife should be met out of the estate which was liable for her maintenance. So a divided co-parcener, though nearer in degree to the husband of the deceased woman, is entitled to claim contribution for money spent by him in performing her funeral ceremonies from an undivided co-parcener related to her husband only in a remote degree.

B. Sitarama Rao for Appellant.

K. Y. Adiga for Respondent.

T. S. V.

Phillips, J.
3rd August, 1925. } *S. A. No.* 1417 *of* 1923.

Aliyasanthana Law—Maintenance—Claim for—Separate maintenance when allowed—Quarrels among members—Inconvenience of joint mess—If grounds for—Equal share to all members including Ejaman—Propriety of.

In an Aliyasanthana family, a claim for separate maintenance cannot be sustained on the mere ground that the members were not getting on well with each other and that a joint mess was extremely inconvenient. 36 Mad. 203, 591, 593 and 42 Mad. 686 referred to.

In allotting maintenance among the members of such a family, an equal share to all members including the *ejaman* is not a proper mode of distribution.

B. Sitarama Rao for Appellant.

K. Y. Adiga for Respondents.

T. S. V.

Phillips, J.
5th August, 1925. } *S. A. No.* 649 *of* 1924.

Contract—Sale of goods—Money paid as advance—If a deposit by way of security—Test—Intention of parties—Breach of contract—Forfeiture.

Where in a contract for sale of goods, the vendee deposits a sum of money with the vendor as advance and on a breach of contract occurring, the vendor claims a forfeiture of the amount, *held*, he would be entitled to do so, if the money was given as a deposit by way of security. The question must be decided by ascertaining the intention of the parties from all the

circumstances of the case. 24 C. W. N. 40 followed; 19 All. 429 ; 38 Mad. 178 distinguished.

P. Venkatramana Rao for Appellant.

B. Somayya for Respondent.

T. S. V.

Phillips, J.
6th August, 1925. } *S. A. No.* 109 *of* 1923.

Hindu Law—Joint family—Guardianship—Father relinquishing all properties in favour of son—If can delegate powers of guardianship—Alienation by mother—If binding.

In a joint family consisting of a father and son, the father released all his rights in the family properties in favour of his minor son, and the latter was living along with his mother and father in the family house. The mother, purporting to act as guardian of the minor, mortgaged certain properties for purposes binding on the minor. On a question arising, whether during the life-time of the father and while he was living in the family, the mother could act as guardian, *held*, that she could do so. The dictum of *Lord Parker* in 38 Mad. 807 at 819 that guardianship being of the nature of a sacred trust, the father could not substitute another in his place is only *obiter* and cannot be said to be of universal application, irrespective of surrounding circumstances.

T. S. Viswanatha Aiyar for *K. Sundara Rao* and *M. C. Sridharan* for Appellant.

K. P. Sarvothama Rao for Respondent.

T. S. V.

Jackson, J.
6th August, 1925. } *Cr. Rev. Case No.* 779 *of* 1924.

Penal Code, Ss 403, 405—*Applicability—Immoveable property.*

There cannot be any criminal breach of trust or criminal misappropriation with regard to immoveable property. 6 Bom. H. C. 33 ; 23 Cal. 372 referred to.

V. L. Ethiraj and *M. C. Sridharan* for Petitioner.

The Public Prosecutor and *E. V. Sundara Reddy* for Respondents.

T. S. V.

Phillips, J.
7th August, 1925.
S. A. No. 12 *of* 1923.

Inam—Resumption—Grant for personal services—Rights of Zemindar against inamdar—Right to eject—Burden of proof.

In the case of a post-settlement *inam* granted in consideration of the grantee rendering personal services to the Zemindar, the grant is one for service to be rendered in lieu of wages and the Zemindar is entitled to put an end to the service and resume the *inam* at any time. (1911) 2 M. W. N. 406; (1914) M. W. N. 179 followed.

Where the Zemindar resumes an *inam* he is not ordinarily entitled to eject the *inamdar* but can only sue him for rent. There is no presumption that the grantee did not own the *kudivaram* on the date of the grant, and the onus of proving the right to eject is on the Zemindar. 18 M. L. T. 142 followed.

B. Somayya for Appellant.

K. V. Krishnaswami Aiyar and *N. Swaminathan* for Respondent.

T. S. V.

Ramesam and Jackson, JJ.
10th August, 1925.
A. S. No. 1 *of* 1923.

Specific Relief Act, S. 42 —Rival trustees—Suit for declaration of right to joint possession—Property attached under S. 146, *Criminal Procedure Code—Injunction if a necessary relief.*

The trustee of a temple sued a co-trustee for a declaration of his right to joint possession. The properties had been attached by a magistrate under S. 146, Criminal Procedure Code, but the defendant still pleaded the suit was not maintainable in the absence of a prayer for an injunction restraining the defendant from interfering with the plaintiff's right to joint possession. *Held*, the suit as framed was maintainable. 29 Bom. 19 at 29 referred to; 43 Bom. 507 at 516 (P. C.) followed.

T. R. Ramachandra Aiyar and *S. Srinivasa Aiyar* for Appellant.

C. S. Venkatachari for Respondent.

T. S. V.

N R C

Jackson, J.
11th August, 1925. } *S. A. No.* 394 *of* 1923.

Provincial Insolvency Act (*V of* 1920), *S.* 20—*Suit for maintenance—Charge claimed - Defendant becoming insolvent pending suit—Effect of—Charge if can be claimed.*

The plaintiff sued for maintenance out of joint family properties in the hands of her husband and claimed a charge on some of them. Pending the suit, the husband became insolvent and the Official Receiver who was impleaded claimed that no charge could be given on the properties in his hands as he had a preferential right under the law on behalf of the general body of creditors. *Held,* (1) S. 28 did not give any such right ; and (2) on the analogy of S. 52, T. P. Act, the suit having been filed prior to insolvency, a charge could be declared as prayed for.

The Advocate-General (*T. R. Venkatrama Sastri*) for Appellant.

B. Somayya for Respondent.

T. S. V.

Phillips, J.
12th August, 1925. } *S. A. No.* 831 *of* 1924.

Madras Estates Land Act, S. 26 (1)—*Bringing waste land into cultivation—Meaning of—Permanent lease by temple trustee—Validity of—Suit for recovery of possession—Limitation Act, Arts.* 134, 144—*Cause of action.*

The trustee of a temple sued his tenant for the fixing of a fair and proper rent and claimed arrears on a certain basis. The latter pleaded that he was in possession under a permanent *cowle* granted by a prior trustee and that he was liable to pay only the amount fixed in the *cowle*. The lands were originally *ryoti*, but owing to disrepair of irrigation facilities had fallen into a state of waste at the time of the *cowle* and the tenant pleaded the lease was binding under S. 26 (1) of the Estates Land Act. He further pleaded that the lease being a permanent one by a temple trustee was void *ab initio* and a suit for possession was barred under Arts. 134 and 144 of the Limitation Act.

Held, (1) S. 26 (1) of the Estates Land Act cannot apply to lands which were in cultivation at a previous period but which had since fallen into a condition of waste ; (2) a suit for posses-

sion would not be barred under Art. 134, Limitation Act, as the temple was an institution and the trustee only its manager and not a person in whom the properties vested within the meaning of Art. 134. 44 Mad. 831 (P. C.) relied on ; and (3) each succeeding trustee had a fresh cause of action to sue, limitation commencing afresh with each trustee. 13 Mad. 277 ; 18 Mad. 266 followed ; 1 Patna 475 dissented from ; 37 Cal. 885 (P. C.) distinguished.

T. L. Venkatrama Aiyar for Appellant.

K. Rajah Aiyar for Respondent.

T. S. V

Jackson, J.
12th August, 1925. } *C. M. P. No.* 1353 *of* 1925.

Civil Procedure Code, O. 33, *R.* 1—*Suit for maintenance—Decree in part—Deposit of amount in Court—Appeal for amount disallowed* in forma pauperis.

A suit for maintenance was decreed in part, the plaintiff being allowed maintenance at the rate of Rs. 15 per month, and the defendant deposited in Court Rs. 570 being the amount due till then. The plaintiff applied for leave to appeal *in forma pauperis* claiming maintenance at the rate of Rs. 60. *Held*, permission to appeal as a pauper should not be given as there was in Court deposit a sum more than sufficient to pay the requisite Court fee. 30 Bom. 593 refd. to ; 10 Bom. 207 folld.; 47 Bom. 523 dissented from.

T. R. Ramachandra Aiyar and *S, Srinivasa Aiyar* for Petitioner.

T. S. V.

The Chief Justice and Beasley, J.
17th August, 1925. } *Ref. No.* 3 *of* 1924.

Income-tax Act (*XI of* 1922), *Ss.* 9 (7) *and* 34—*House furnished and ready for occupation—Vacancy—Decision of Income-tax Officer after notice—If can be re-opened.*

A house which is furnished and ready for occupation must, for the purposes of the Income-tax Act, be taken to be occupied and deduction cannot be claimed as in respect of vacancies, even if no one lived there actually during the year of assessment. 2 Q. B. D. 581 folld.

Where an Income-tax Officer after notice to the assessee deliberately decides one item to be unassessable, he has power under S. 34 to re-assess it next year. The words "escape assessment" and "or has been assessed at too low a rate" are sufficiently wide for this purpose.

T. R. Ramachandra Aiyar and *L.S. Veeraraghava Aiyar* for Assessee.

M. Patanjali Sastri for the Commissioner of Income-tax.

T. S. V.

Phillips and Ramesam, JJ. 18*th August*, 1925. } *S. R. No.* 14383 *of* 1924.

*Court Fees Act, S. 7 (ix) and Sch. I, Art. 1—Suit on kanom—Appeal relating solely to amount of improvements—*Ad valorem *fee if payable.*

Arising out of a decree in a suit to redeem a kanom, an appeal was filed in which the right to redeem was not disputed, but only the amount of compensation for improvements due to him. *Held*, Court-fee was payable *ad valorem* on the extra amount claimed as compensation. S. 7 (ix) of the Court Fees Act applies only to suits and not to appeals. 23 Mad. 84 distd.; 29 Mad. 367 ; 27 All. 447 ; 36 All. 40 folld.

K. P. Ramakrishna Aiyar for Appellant.

The Government Pleader for the Crown.

T. S. V.

Jackson, J. 18*th August*, 1925. } *C. R. P. No.* 765 *of* 1923.

Civil Procedure Code, Sch. II, R. 1—Reference to arbitration—Defendant ex-parte *but still interested—Not a party to the reference—Award—Effect of—Interference in revision.*

Where in a suit a defendant is declared *ex parte* and a reference to arbitration is made to which he is not a party though he is "interested" within the meaning of R. 1, the award that is passed is not a valid one and can be set aside in revision. 27 C. L. J. 939 ; 42 Mad. 632 ; 29 Cal. 167 (P. C.) referred to.

K Bhashyam Aiyangar for Petitioner.

A. Venkatrayaliah, Venkatanarasiah and *V.C. Viraraghavan* for Respondent.

T. S. V.

PRIVY COUNCIL.

2nd & 3rd July, 1925.—*Ahmed Khan and others* v. *Mst. Channi Bibi* (Lahore—Appeal No. 74 of 1921).

CORAM : *Lord Finlay, Sir John Edge, Mr. Ameer Ali* and *Mr. Justice Duff.*

The respondent (plaintiff) here claimed, as sister of one Waris Ali, deceased, certain lands in the village of Surg Sahur, near Attock, and the question is what are her rights according to Muhammadan Law or the custom of the Khattar tribe.

L. de Gruyther, K. C. and *E. B. Raikes* for Appellant.

Dr. H. R. Majid for Respondent.

Judgment reserved.

6th July.—*Mst. Farid-un-nissa* v. *Mukhtar Ahmed and another.* Judgment delivered, allowing the appeal.

6th July.—*Kushaldas Gokuldas and another* v. *Chunilal Kalidas and others* (Bombay).

CORAM : *Lord Finlay, Lord Blanesburgh, Sir John Edge* and *Mr. Ameer Ali.*

The respondents (plaintiffs) in Suit No. 446 of 1919 claimed a 2-anna share of the appellants' (defendants') commission as agents of the Hemabhai Manufacturing Co., Ltd. for the period 1915—1917, and in Suit No. 693 of 1922 for the period 1918—1921. The appellants *inter alia* denied the claims, and also pleaded the Limitation Act, 1898, as regards the commission for 1915 and 1918. The Subordinate Judge, Ahmedabad, upheld the defence of limitation, but, on the whole, decreed the first suit for Rs. 5,395, and the second for Rs. 14,504-11-11. Upon appeal and cross-appeal, the High Court, Bombay, rejected the defence of limitation, and enhanced the decree in Suit No. 446 of 1919 by Rs. 562-5-4 and that in Suit No. 693 of 1922 by Rs. 1,826-5-0 ; and they refused leave to appeal holding that the judgments were in substance concurrent and beyond the question as to the time at which the commission was payable, there was no question of law under S. 110, Civil Procedure Code, 1908. The defendants now prayed for special leave to appeal, contending that (1) their appeal arose through the High Court judgment varying, and not affirming, that of the Subordinate Judge ; (2) the defence of limitation raised a substantial question of law.

Sir G. Lowndes, K. C. and *J. M. Parikh* for Petitioner.

Petition granted.

6th & 7th July.—*Md. Khaleel Shirazi & Sons* v. *Les Tannerie Lyonnaises and Marret* (Madras—Appeal No. 30 of 1924).

CORAM : *Lord Finlay, Lord Blanesburgh, Sir John Edge* and *Mr. Ameer Ali.*

On the 27th May, 1917, the appellants (plaintiffs) alleged that the first respondents, by their Manager, the second respondent, entered into a contract with them, whereby the appellants were to buy goat-skins for the respondents, half-tan them by a certain process, and deliver them to the respondents at Pondicherry in exchange for (*a*) the cost of the raw skins ; (*b*) 10 per cent. on the purchases for financing ; (*c*) Rs. 17-8-0 per 100 skins for half-tanning. The appellants claim accordingly Rs. 1,70,000. Phillips, J., on the 20th October, 1920, dismissed the action as against the second respondent, but gave judgment for Rs. 1,49,063, with interest and costs as against the first respondents. This latter sum was, on the 14th March, 1922, reduced by the Court of Appeal (Coutts Trotter and Ramesam, JJ.) to Rs. 25,824 and costs and interest.

Sir G. Lowndes, K. C., K. Brown and *T. C. K. Kurup* for Appellants.

A. M. Dunne, K. C. and *B. White* for First Respondents.

E. B. Raikes for Second Respondent.

9th July.—Hearing resumed, and adjourned to October Sittings.

7th July.—*Bhupendra Narayan Singh* v. *Narapat Singh.*
Judgment delivered, allowing the appeal.

10th July.—*M. A. Mamoojee* v. *Howeson Bros.* (Bengal—Appeal No. 150 of 1924).

CORAM : *Lord Finlay, Lord Blanesburgh, Sir John Edge* and *Mr. Ameer Ali.*

In the respondents' suit on two mortgages, the usual preliminary mortgage-decree was passed, and it was also ordered that one, Harvey, be appointed Receiver of the rents and profits of the mortgaged property on furnishing security in Rs. 60,000 to the satisfaction of the Registrar. The appellant stood surety for Harvey, and executed a bond to the Registrar, but later applied to be discharged therefrom on being dissatisfied with Harvey's management. No order was made on the application. Subsequently, on the application of the respondents, under S. 145 of the Civil Procedure Code, Greaves, J. ordered the

appellant to pay to respondents the sum of Rs. 32,806-14-3 found due by Harvey as Receiver. This order was confirmed on appeal on the 8th May, 1923.

L. de Gruyther, K. C. and *K. Brown* for Appellant.

A. M. Dunne, K. C. and *G. D. McNair* for Respondents.

Appeal dismissed with costs.

13th and 14th July.—*Ram Protap Chamria* v. *Durga P. Chamria and others* (Bengal—Appeal No. 120 of 1924).

CORAM : *Lord Blanesburgh, Lord Darling,* and *Sir John Edge.*

On the 12th January, 1922, the appellant sued the respondents (of whom the 5th was a minor) for dissolution of a partnership carried on under an agreement of November, 1916. On the 23rd May, 1922, in accordance with an agreement arrived at between the parties on the 11th May for the reference of *all* disputes between the parties to arbitration, an order was made in the pending suit, referring matters *in litigation therein* to arbitration. The arbitrators made their award on the 27th May. On the 5th July, 1922, Respondent No. 4, as guardian *ad litem* of Respondent No. 5, gave notice of his objection to the award on the ground that it purported to deal with matters not in question *in the suit.* The Courts in India accordingly set aside the award.

L. de Gruyther, K. C. and *W. Wallach* for Appellant.

W. H. Upjohn, K. C., Sir G. Lowndes, K. C., A. M. Dunne, K. C. and *K. V. L. Narasimham* for Respondents.

Judgment reserved.

16th, 17th, 20th, and 21st July—*Saklat and others* v. *Bella* (Lower Burma—Appeal No. 57 of 1924).

CORAM : *Lord Phillimore, Lord Blanesburgh,* and *Sir John Edge.*

Plaintiffs (appellants), who are Parsis, relying on *Petit* v. *Jeejeebhoy,* 33 Bom. 509, claim that the respondent, who is the daughter of a Parsi mother by a Goanese father, was not, and indeed could not, be legally adopted by the late Shapurjee Cowasjee, and further that she could not be rightly received into the Zoroastrian religion by the *navjot* or *barasnam* ceremonies, and that consequently she was not entitled to the use of the Parsi Fire Temple at Rangoon, the site of which was

granted by Government to the Parsis as a religious community, and not as a race.

A. M. Dunne, K. C., Sir G. Lowndes, K. C. and *E. B. Raikes* for Appellants.

W. H. Upjohn, K. C. and *W. Draper* for Respondent.

Judgment reserved.

17th July.—*Chandra Sen and another* v. *Kanhaiya Lal* (Allahabad).

In March, 1921, the respondent's suit against the appellants for Rs.14,543, due on a mortgage-bond, dated the 31st May, 1908, was dismissed by the Subordinate Judge, Aligarh, but was decreed on appeal by the High Court in December, 1924, who also subsequently granted them a certificate under Ss. 109 and 110, Civil Procedure Code, for appeal to the Privy Council. The petitioners, who are minors, aged 9 years and 7 years, respectively, under the guardianship of *Purdanashin* ladies, having failed in due time to furnish security for costs, the leave to appeal was cancelled on 12th June, 1925. But they thereafter found the necessary security by mortgage. Hence their present application for special leave to appeal.

S. Hyam for Petitioners.

Leave granted.

20th July—*Bejoy Chand Mohatab* v. *Kohoha Sinha and others* (Bengal).

The respondents having failed to pay rent due under a *Patni* settlement, the land was sold by public auction, but this sale was later set aside by the High Court. The petitioner then brought an action for the arrears of rent, and the questions raised were whether time under the Limitation Act, 1898, runs under Art. 110 thereof from the date when the sale was set aside or when the rent became due. The Courts in India had decided in favour of the latter alternative. The plaintiff now applied for special leave to appeal.

Parikh for Petitioner.

Petition dismissed.

21st July—*Sourendra Mohan Sinha and others* v. *Har P. Sinha and others*. Judgment delivered, dismissing the appeal, but allowing the cross-appeal.

21st July—*Mahabir P. Tewari* v. *Jamuna Singh and another.* Judgment delivered, dismissing the appeal.

A de M.

HIGH COURT.

The Offg. Chief Justice and Viswanatha Sastri, J. } *A. S. No.* 252 *of* 1922.

7th August, 1925.

Specific performance—Suit for—Damages for mental worry—If can be awarded—No covenant to discharge encumbrances—Decree directing vendee to discharge—Validity of—T. P. Act, S. 55 (2)—*Covenant to discharge encumbrances—If runs with the land.*

In a suit for the specific performance of an agreement to sell land, the plaintiff, in addition to getting a decree for specific performance, cannot obtain damages for mental worry, loss of interest, etc.

Where there was no express covenant on the part of the original vendors to discharge the encumbrances on the property and the decree nevertheless directed both the vendors and the subsequent purchasers to discharge the encumbrances, the decree in so far as it affects the purchaser is not valid in law ; neither S. 18 (*c*) nor S. 27 of the Specific Relief Act will apply.

Quaere : Whether an implied covenant to discharge encumbrances under S. 55 (2) of the T.P. Act will run with the land so as to affect subsequent purchasers for value ?

T. V. Ramanatha Aiyar and *A. Krishnaswami Aiyar* for Appellants.

T. M. Krishnaswami Aiyar and *S. S. Ramachandra Aiyar* for Respondent.

T. S. V.

Jackson, J.

14*th August,* 1925. } *Cr. Rev. Case No.* 47 *of* 1925.

Penal Code, S. 225 (*b*)—*Civil Procedure Code, S.* 55—*Arrest by Court Bailiff for Civil Court-decree after sunset—Escape from arrest—Veranda, if part of dwelling-house.*

Where the accused was arrested in the veranda of his house after sunset in pursuance of a warrant for a Civil Court decree and he escaped from arrest, and was charged and convicted under S. 225 (*b*), Indian Penal Code :

Held, the arrest was illegal as the veranda was part of a dwelling under S. 55, Civil Procedure Code, and the accused could not be arrested after the sunset in a dwelling-house.

K. P. Ramakrishna Aiyar for Petitioner.

The Public Prosecutor for the Crown.

T. S. V.

Jackson, J.
18*th August*, 1925. } *C. R. P. No.* 923 *of* 1923.

Specific Relief Act, S. 9—Landlord and tenant—Latter in possession—Right of landlord to sue trespasser.

Where a tenant is in possession under a subsisting lease, a landlord cannot maintain a suit under S. 9, Specific Relief Act, against a trespasser. 18 All. 437 ; 21 Mad. 288 ; 19 M. L. J. 347 ; 44 Mad. 937 folld. ; 15 I. C. 146 dissented from.

K. Rajah Aiyar and *N. Panchapakesa Aiyar* for Petitioner.

B. Somayya for Respondent.

T. S. V.

Viswanatha Sastri, J.
19*th August*, 1925. } *C. R. P. No.* 740 *of* 1923.

Madras District Municipalities Act, S. 95—Profession tax—Ownership of house—Residence—If amounts to—Tax imposed by Chairman—Failure to appeal to Municipal Council—Bar of suit for refund.

A person who owns a house within a municipality into which he could go at any time he pleased, must be deemed to have resided in the municipality for the purposes of S. 95 of the District Municipalities Act, even though he did not actually live there.

Where a person assessed to profession tax by the Chairman of a Municipal Council omits to appeal to the Municipal Council, but files a suit for the refund of tax paid under protest, the suit is barred.

K. R. Rangaswami Aiyangar for Petitioner.

N. Rajagopalachari for Respondent.

T. S. V.

Phillips, J.
19th August, 1925.
S. A. No. 292 *of* 1923.

Execution—Order for sale—Death of judgment-debtor—Sale without notice to legal representative—Nullity.

Where after an order for sale in execution of a decree, the judgment-debtor dies, and the sale takes place and is completed without notice to his legal representative, it is a nullity. 42 Cal. 72 (P. C.) and 41 M. L. J. 547 folld. ; 47 Mad. 68 not folld. ; 47 Mad. 288 (F. B.) relied on.

P. Satyanarayana Rao for Appellant.

C. S. Venkatachari and *A. Venkatachelam* for Respondent.

T. S. V.

Madhavan Nair, J.
19th August, 1925.
S. A. No. 754 *of* 1921.

Hindu Law—Joint family—Debt incurred by father—Suit against father and sons—Sons exonerated—Decree against father alone—Attachment and sale of the joint family properties—If son's share will pass.

Where a debt was incurred by a father of a joint Hindu family and a suit was filed against the father and sons, but the sons were exonerated and a decree was passed against the father alone, and joint family properties were attached and sold in auction :

Held, it is open to the decree-holder to sell the sons' shares also though they were exonerated under the decree.

28 A. 288 followed.

C. Narasimhachari for Appellant.

K. P. Ramakrishna Aiyar for Respondent.

T. S. V.

Spencer and Ramesam, JJ.
20th August, 1925.
O. S. A. No. 80 *of* 1924.

Indian Succession Act, S. 117*—Will—Construction—Gift over—Condition—Strict construction.*

A clause in a will provided as follows :—" I bequeath the residue of my estate to the grandson or grandsons that may or will be born to my son *X* within 10 years after my death. If there are no such grandsons born as aforesaid, the residue will

be distributed among my grand-daughters after my wife's death.' By a codicil he postponed the distribution to the grand-daughters until after the death of his son, wife and daughter-in-law. There were no grandsons alive on the date of the death of the testator, but one was born within two years of his death. One of the grand-daughters claimed that as there was no grandson on the date of the testator's death, the gift over took effect. *Held*, the case fell within S. 117, Indian Succession Act, and that the condition subject to which the gift over was made should be strictly fulfilled before the grand-daughters could take. As a grandson was born within 10 years of his death, the condition was not fulfilled. English case-law discussed. 38 Bom. 697 doubted.

O. T. Govindan Nambiar and *S. Satagopa Mudaliar* for Appellant.

A. C. Sampath Aiyangar and *P. Krishnamachari* for Respondent.

T. S. V.

Venkatasubba Rao and Madhavan Nair, JJ. *25th August*, 1925. — *C. M. A. No.* 380 *of* 1923.

Civil Procedure Code, S. 39—Transfer of decree for execution—Legal representatives of judgment-debtor—Application to bring on record—Forum—Question of limitation—Decision before transmission.

An application to bring the legal representative of a judgment-debtor on record for purposes of execution can be entertained only by the Court which passed the decree. The question must be decided after investigation, if there is a dispute as to who is the legal representative and cannot be reserved for determination by the Court to which the decree is transmitted. 28 Mad. 466 applied.

Questions of limitation, etc., must also be disposed of before transmission by the Court which passed the decree. 19 L. W. 650 referred to.

S. R. Muthusami Aiyar for Appellants.

M. Subbaraya Aiyar for Respondents.

T. S. V.

Jackson, J.
28th July, 1925. } *C. M. S. A. No.* 47 *of* 1924.

Presidency Towns Insolvency Act, S. 30—*Composition — Order approving composition— Binding nature of, on creditors not mentioned in the schedule.*

Under S. 30 of the Presidency Towns Insolvency Act of 1909 the composition approved by the Court is binding not only upon the creditors of the insolvent whose names are entered in the schedule but also against all the other creditors of the insolvent. 48 M. L. J. 252 referred.

A. Krishnaswami Aiyar and *C. A. Seshagiri Sastri* for Appellants.

S. Varadachariar, V. C. Veeraraghava Aiyangar and *R. Viswanatha Aiyar* for Respondent.

C. A. S.

Jackson, J.
5th August, 1925. } *S. A. No.* 1806 *of* 1923.

Practice and procedure—Suit by plaintiff to recover properties for himself and some of the defendants—Claim by the defendants for their shares—Decree for the shares of the defendants, whether can be passed.

Plaintiff sued for recovery of certain properties for himself and certain of the defendants paying the entire court-fee himself, on foot of an arrangement under which plaintiff equally with those defendants was entitled to the properties in question. Those defendants also claimed their shares of the properties in their written statements and the Courts below passed a decree for partition in favour of those defendants as well as the plaintiff. On a point taken in second appeal that the defendants should not have been given a decree, *held*, distinguishing 35 M. L. J. 153, that the suit as framed was comprehensive enough to sustain a decree in favour of the defendants as well as the plaintiff.

P. Somasundaram and *P. Satyanarayana* for Appellants.

Ch. Raghava Rao for Respondent.

C. A. S.

N. R. C.

Phillips, J.
10th August, 1925 } *S. A. No.* 43 *of* 1923.

Civil Procedure Code, S. 11, *Explanation* 4—*Suit for possession based on an arrangement, dismissed as arrangement not proved and on the ground of adverse possession—Subsequent on title as heir* —Res judicata.

A person sued certain trespassers in possession alleging that the properties originally belonged to one Venkanna, that, after his death, he became his heir, that he allowed a female relation of the said Venkanna to enjoy the suit properties for her maintenance, that she having died the defendants refused to deliver possession. The suit was dismissed on the ground that even assuming plaintiff was the heir of Venkanna, his agreement with the lady was not made out, and that the lady had acquired title by adverse possession. Thereafter the plaintiff brought the present suit against the same defendants alleging that even assuming the property to be the property of the lady as found in the former suit he would be the sole heir to her entitled to recover possession.

Held, that the present suit was barred by *res judicata* under Explanation IV to S. 11 of the Code of Civil Procedure. 46 M. 135; 52 I. C. 735; 34 I. C. 456 ; 1916 M. W. N. 287 ; 48 M. L. J. 64 (P.C.) ; 11 B. L. R. 158 (P.C.) followed. 26 M. 760 ; 7 M. 264 distinguished.

Ch. Raghava Rao for Appellant.

B. Jagannadha Doss for *V. Suryanarayana* for Respondent.

C. A. S.

Phillips, J.
17th August, 1925. } *S. A. No.* 265 *of* 1923.

Co-purchasers—One paying more than his share of the purchase money—Whether a charge is created on the other's share.

The 1st and the 2nd defendants together purchased the suit properties in 1914, the 1st defendant advancing Rs. 340 and the 2nd defendant only Rs. 60, but both intending to take the properties in equal halves. At the time of purchase the properties were in the possession of an usufructuary mortgagee. In 1918 the 1st defendant redeemed the mortgage and got into possession. An alienee from the 2nd defendant afterwards

commenced the present suit for redemption and partition of his half share in the suit properties offering to pay the 1st defendant half the amount paid by her to the mortgagee. The latter claimed as a condition precedent also the payment of the sum of Rs. 140 paid by her in 1914 in excess of her share of the purchase money with interest. *Held*, that she could do so and that whether there was a charge in law or not, in equity such a claim could be enforced

A. V. Narayanaswami Aiyar for Appellant.

K. V. Sesha Aiyangar for Respondent.

T. S. V.

Phillips, J. } *S. A. No.* 86 *of* 1923.
20th August, 1925. }

Civil Procedure Code, S. 102—*Suit for value of goods sold —If of a small cause nature—No second appeal.*

A suit by a vendor against a vendee for the value of goods sold is a suit of a small cause nature and no second appeal lies where the amount in question is below Rs. 500.

M. Krishna Bharati for Appellant.

K. R. Rangaswami Aiyangar for Respondent.

T. S. V.

Jackson, J. } *C. R. P. No.* 108 *of* 1925.
21st August, 1925. }

Civil Procedure Code, O. 13, *R.* 1—*First hearing, meaning of—Date of settlement of issues.*

The expression "first hearing" in O. 13 R. 1 of the Civil Procedure Code means the date of the settlement of issues and not the date when the case first heard on evidence. 8 C. L. J. 147 ; 78 I. C. 489 followed. 50 I. C. 295 not followed.

K. S. Jayarama Aiyar for Petitioner.

C. A. Seshagiri Sastri for Respondent.

C. A. S.

The Chief Justice and }
Viswanatha Sastri, J. } *O. S. A. No.* 83 *of* 1924.
24th August, 1925. }

Shipping—Charterparty—Shipowner if common carrier—Law applicable—Advance freight—If recoverable, in cases of frustration of adventure.

A ship was chartered to carry rice from Akyab to the Madras Coast and the terms of the charterparty were that one portion of the freight was payable on acceptance of the charter, another portion on loading the cargo and the balance on delivery of the cargo. The advance freight was paid, but cargo could not be loaded as the necessary license was refused by the Controller. In a suit for damages on the basis of the charter-party, there was a counter-claim by the charterer for refund of the advance freight under S. 65, Indian Contract Act. The suit was dismissed, and the counter-claim decreed, the finding of the Trial Judge being that both parties were aware that a license had to be taken out and that it was an implied condition that the license should be obtained by the defendant. In an appeal by the shipowner as regards the decreeing of the counter-claim for refund of advance freight paid, *held*, (1) where a ship is chartered wholly, the shipowner is not a common carrier and hence the parties are governed by the Indian Contract Act and not by the Common Law of England. 38 Mad. 941 distd. ; (2) the principle of law that advance freight paid could not be recovered is not one peculiar to the maritime law of England but is only part of the general law of contracts and forms an example of a contract with an executed consideration.

40 Bom. 529 folld. ; (1903) 2 K. B. 756 considered and explained ; 48 M. L. J. 413 referred to.

S. Srinivasa Aiyar for Appellant.

K. Sundara Rao for Respondent.

T. S. V.

Phillips and Ramesam, JJ.
25th August, 1925. } *S. A. No.* 11 *of* 1922.

Landlord and tenant—Lands classified as permanent or shifting—Levy of poll-tax and plough-tax—Occupancy rights—Jagirdar—Rights of—Land if an estate.

In a jagir in the South Arcot District, the lands under cultivation were classified according as the cultivation was more or less permanent or shifting. The only tax levied from the persons in occupation were a poll-tax and plough-tax and the lands were not assessed to any rent. *Held*, the ordinary law of landlord and tenant applied and the tenants had no permanent occupancy rights. But the tenants were entitled to all the produce including the minor forest produce ; if the jagirdar

claimed to be entitled to such minor forest produce, he must prove a contract or custom to that effect.

Per Ramesam, J.—The jagir was not an estate within the meaning of S. 3 (*d*) of the Madras Estates Land Act.

41 Mad. 1012; 36 Bom. 658 ; 46 Mad. 335; S.A. Nos. 1355 to 1362 of 1910 ; S. A. Nos. 261 and 262 of 1911 referred to.

C. V. Anantakrishna Aiyar and *A. V. Viswanatha Sastri* for Appellants.

T. Rangachari, C. Padmanabha Aiyangar and *T. D. Srinivasachari* for Respondents.

T. S. V.

Venkatasubba Rao and Madhavan Nair, JJ.
26th August, 1925. — *A. S. No.* 333 *of* 1922.

Civil Procedure Code, S. 92—Interest — What is—Residence in the neighbourhood—Occasional worship —Suit for recovery of property—Decision adverse to the trust in a prior suit by trustee —If res judicata.

A decision to the effect that a certain property does not belong to a trust given in a suit by the trustee to recover possession of the property operates as *res judicata* in a subsequent suit filed by relators with the sanction of the District Collector under S.92, Civil Procedure Code, for the recovery of the same.

The "interest" contemplated by S. 92 must be direct, substantial and not illusory. Persons living in the neighbourhood of a temple and worshipping there, though not habitually, are persons interested within the meaning of the section. 42 Mad. 360; 47 Mad. 884 (P.C.) referred to.

G. Lakshmanna and *K. Kameswara Rao* for Appellant.

P. R. Ganapathi Aiyar, V. Krishna Mohan, G. Krishna Arya and *Viraraghavalu* for Respondents.

T. S. V.

Jackson, J.
26th August, 1925. — *C. R. P. No* 426 *of* 1925.

Madras District Municipalities Act—Rules for the decision of disputes as to the validity of elections, R. 12 (2) (*b*)*—Election set aside—Re-election ordered—Propriety of order.*

Where in setting aside the election of the respondent at a Municipal election, the Court below ordered a "re-election"

admitting the petitioner as a candidate for such re-election, *held*, the order was wrong and under R. 12 (2) (*b*) of the Rules for the decision of disputes as to the validity of elections, the Court should order a fresh election

K. Kameswara Rao for Petitioner.

C. Sambasiva Rao and *K. Ramamurthi* for Respondent.

T. S. V.

Phillips, J.
27th August, 1925. } *S. A. No.* 867 *of* 1923.

Madras Estates Land Act, S. 151—*Ejectment—Occupancy ryots--Sale of major portion of land for building purposes—Effect of.*

The sale by an occupancy ryot of 14 acres out of an entire holding of 15 acres for building purposes to several persons impairs the value of the holding for agricultural purposes and the ryot can be ejected on the basis of such act alone.

C. S. Venkatachari and *A. Venkatachellam* for Appellant.

Sir K. V. Reddi for Respondent.

T. S. V.

Venkatasubba Rao and Madhavan Nair, JJ.
28th August, 1925. } *C. M. A. No.* 450 *of* 1924.

Civil Procedure Code, Ss. 19, 21, 24, 39—*Mortgage decree—Transfer for execution—Court having no jurisdiction over properties—Effect of.*

Where a mortgage decree is transferred for execution to a Court which has no jurisdiction over the mortgaged properties, a sale held in execution of the decree is not void for want of jurisdiction. All defects as to jurisdiction are curable by S. 21, Civil Procedure Code, and the exception as to a mortgage decree in S. 19 will apply even if the properties are situated wholly outside the Court's jurisdiction.

S. 24, Civil Procedure Code, will also apply to a case of transfer of decree for execution and it is not governed by S. 39.

S. Varadachariar and *K. Champakesa Aiyangar* for Appellant.

The Advocate-General, T. M. Krishnaswami Aiyar and *N. Sivaramakrishnier* for Respondents.

T. S. V.

Venkatasubba Rao and Madhavan Nair, JJ.
28th August, 1925. — *L. P. A. Nos.* 64 *to* 66 *of* 1924.

Negotiable Instruments Act, Ss. 28, 29—*Pronotes executed by guardians and by executors—Description as guardians in the body of the note—If sufficient to exclude personal liability of guardians—Signature as guardians—Whether makes a difference —Executors—Liability not limited to assets in the pronote—Effect —Will void and executors not validly appointed—Whether renders S.* 29 *inapplicable—Principle of S.* 28—*If applies to guardians' pronotes.*

Although in terms S. 28 of the Negotiable Instruments Act applies only to agents, its principle is applicable to pronotes executed by guardians as representing a minor. And, that the personal liability of the guardians is excluded, must appear on the face of the note itself. 46 C. 663 (P.C.) applied.

Where two guardians executed a pronote reciting in the body "Viswanadhan being a minor," and reciting that it was in renewal of a debt of the deceased father of the minor, and bound themselves severally (" either of us ") to pay, and signed it without adding any qualification to the signature, *held*, they were personally liable.

But where the signatures also were qualified by the addition of the words "guardians,' *held*, they were *not* personally liable.

Where persons describing themselves as executors executed a pronote, but said nothing about limiting their liability to the assets of the deceased, *held*, they were personally liable on the pronotes.

That the will by which they were so appointed was void under the Hindu Law as having been made by an undivided Hindu father was held to make no difference in the decision of the case on the pronote. 47 M. L. J. 765 in part affirmed and in part reversed.

A. Krishnaswami Aiyar, B. Satyanarayana and *K. N. Rajagopal Sastri* for Appellants.

P. Somasundaram for Respondents.

T. S. V.

Ramesam, J.
3rd September, 1925. — *S. A. No.* 1565 *of* 1922.

Benamidar—Suit for specific performance—Whether entitled to obtain decree.

N R C

A benamidar is entitled to maintain a suit and obtain a decree for specific performance.

P. Somasundaram and *E. Krishnamurthi* for Appellant.

G. Lakshmanna and *K. Kameswara Rao* for Respondents.

C. A. S.

Reilly, J.
4th September, 1925. } *S. A. No.* 209 *of* 1923.

Contract Act, S. 11—Minor stating that he was a major and executing a sale deed—Suit by minor after majority to set aside sale deed—Whether estopped from pleading minority—Specific Relief Act, S. 41—Whether Court can impose terms in granting relief.

Where a person represented that he was a major and executed a sale deed and later on brought a suit for setting aside the sale on the ground that he was a minor at the time of executing the sale : *Held*, (1) that he was not estopped from pleading his minority and that the sale was not binding on him, as he was a minor at the time of the sale ; (2) that in granting relief the Court may impose terms under S. 41 of the Specific Relief Act and order that the money paid to the minor be refunded to the vendee. A. S. No. 89 of 1920 (unreported) and 10 L. W. 225 followed. 7 L. W. 134 referred to. 41 B. 480 and 46 B. 137 not followed.

K. N. Rajagopal Sastri for *B. Satyanarayana* for Appellant.

B. Somayya and *E. Krishnamurthi* for Respondent.

C. A. S.

The Chief Justice and Beasley, J.
7th September, 1925. } *O. S. A. No.* 15 *of* 1925.

Income-tax Act, S. 10 (2) (vii)—Obsolete—Meaning of—Items in the section to be read disjunctively.

The term "obsolete" in S. 10 (2) (vii) of the Income-tax Act connotes uselessness arising from supersession of the article by improved designs in machinery and does not include a case where the article—in this case a motor-car—was lost or damaged in an accident.

The various items of deduction mentioned in S. 10 ought to be read disjunctively and the mere fact that some items

overlap is no ground for refusing deduction. Where the items claimed to be deducted are not in the way of capital expenditure, the assessee can claim the same as deduction.

K. V. Sesha Aiyangar for Appellant.

M. Patanjali Sastri for Respondent.

T. S. V.

Spencer, J.
7th September, 1925. } *S. A. Nos.* 1803 *and* 1804 *of* 1922.

Hindu Law—Joint family—Alienee from one co-parcener—Suit in ejectment and counter-suit for specific performance—Partition decree if can be awarded in suit for possession.

In a joint family consisting of A and B, B agreed to sell to C an item of family property and put C in possession. B died leaving two sons D and E, and a suit was filed by A, D and E to eject C. C pleaded that the properties belonged to B as his self-acquisition and also brought a suit for specific performance. The property was found to be joint family property. *Held,* C was entitled to specific performance with regard to half the property on the ground that D and E claimed under B within the meaning of S. 27, Specific Relief Act, and resist the suit for possession with respect to such share. A preliminary decree for partition could be passed in the ejectment suit, and the suit in ejectment could be decreed only with regard to A's half share. 46 Mad. 219 relied on ; 20 Mad. 354 ; 17 L. W. 346 and other cases discussed.

Ch. Raghava Rao for Appellant.

B. Jagannadha Das with *V. Suryanarayana* for Respondent.

T. S. V.

Spencer and Madhavan Nair, JJ.
8th September, 1925. } *C. M. A. No.* 86 *of* 1925.

Execution—Attachment before judgment—Sale without attachment—Dismissal of objection—Appeal, if competent—Sale if illegal—Prejudice.

A decree-holder who had obtained an attachment before judgment applied for execution, but in the application did not pray for a fresh attachment. The judgment-debtor objected to the execution application on the ground that there was no

prayer for attachment. The objection was overruled and sale directed to be held. After the sale the judgment-debtor appealed against the order dismissing his objections. *Held*, per *Spencer, J.*, the appeal was not maintainable and his remedy is under O. 21, R. 90. Per *Madhavan Nair, J.*—A sale without an attachment is not illegal and unless the judgment-debtor is shown to have been prejudiced, it cannot be set aside. 18 Cal. 188 ; 30 Mad. 255 at 264 ; 24 M. L. J. 70 ; 37 I. C. 964 ; 21 All. 311 relied on ; 38 Cal. 482 ; 36 Bom. 156 not followed; 41 Cal. 590 (P. C.) distinguished.

The Advocate-General and *M. Krishna Bharati* for Appellant.

T. R. Ramachandra Aiyar and *P. R. Ramakrishna Aiyar* for Respondents.

T. S. V.

Jackson, J.
8th September, 1925. } *C. R. P. No.* 776 *of* 1923.

Civil Procedure Code, O. 21, *Rr.* 13 *and* 17—*Application for execution not in accordance with law—Schedule of immoveable properties not given—Amendment after period of limitation—If application in time.*

Where an application for execution of a decree, dated 7th March, 1910, was filed on 28th February, 1922, and the prayer was for attachment of immoveable properties, the list of which it was stated would be filed later and was filed only on 5th April, 1922, on which date the execution of the decree was barred, *held*, the application must be deemed to be out of time as the original application was not in accordance with law and the execution Court must be deemed to have refused to extend the time as no further time was fixed on the original application. 45 M. L. J. 651 distinguished ; 17 C. 631 referred to.

R. Govinda Menon for Petitioner.

K. P. Ramakrishna Aiyar for Respondent.

T. S. V.

Spencer and Madhavan Nair, JJ.
9th September, 1925.
C. *M. A. No.* 70 *of* 1925.

Civil Procedure Code, S. 47—*Appeal—Scheme framed for a temple—Order appointing trustee under scheme.*

An order appointing a certain person as trustee of a temple under a scheme framed by the Court is not an order in execution of a decree and hence is not appealable.

T. M. Krishnaswami Aiyar and *K. S. Varadachari* for Appellant.

K. V. Sesha Aiyangar for Respondent.

T. S. V.

Jackson, J.
9th September, 1925.
Cr. Rev. Case No. 409 *of* 1925.

Workmen's Breach of Contract Act—Proceedings under—Nature of—Adjudication of workman—Protection order—Default in payment of advance—If liable to imprisonment.

A workman was directed to repay his master under the Workmen's Breach of Contract Act the advance received by him in monthly instalments. He was subsequently adjudicated insolvent, the debt due to the master being included in the schedule and protection order was granted in respect thereof. He committed default in payment of the monthly instalment and a Magistrate sentenced him to imprisonment for such non-payment. It was argued that Ss. 17 and 46 of the Presidency Towns Insolvency Act barred such proceedings being valid. *Held,* the bar contained in those sections did not apply to criminal proceedings and as the proceedings before the Magistrate under the Workmen's Breach of Contract Act were criminal proceedings, the conviction was legal. 35 Bom. 63 followed.

T. K. Rangaswami for Petitioner.

R. Satyanarayana for Respondent.

T. S. V.

Devadoss and Waller, JJ.
11*th September*, 1925.
C. M. A. No. 346 *of* 1924.

Civil Procedure Code, S. 2 (2) *and O.* 22, *Rr.* 3, 5—*Death of plaintiff—Only one person claiming to be impleaded as*

legal representative—Dismissal of application—Order if amounts to a decree—Appeal.

Their Lordships referred to a Full Bench the question whether an order of dismissal passed on an application put in by a sole claimant to be impleaded as the legal representative of a deceased plaintiff amounts to a decree and as such is appealable.

K. Bashyam Aiyangar for Appellant.

K. S. Jayarama Aiyar and *S. Nagaraja Aiyar* for Respondent.

T. S. V.

Jackson, J.
1ith *September*, 1925. } *C. M. S. A. No.* 109 *of* 1923.

Civil Procedure Code, O. 34, *Rr.* 4, 5 *and* 15—*Suit to enforce a charge—Decree for sale—No final decree passed—Application for execution of preliminary decree—Construction.*

Where in a suit to enforce a charge a decree was passed directing the defendants to pay plaintiff within two months the sum of Rs. 458 with interest and costs and in default of payment within the time fixed the plaintiffs were to recover the amount by the sale of the rights of defendants 1 to 3 over the plaint property and from their other properties and an application was put in for sale. *Held*, on a construction of the decree, that it was a preliminary decree and could not be executed without a final decree being passed.

K. Kuttikrishna Menon for Appellant.

K. P. Ramakrishna Aiyar for Respondent.

[Krishnan, J. held *contra* in a similar case reported in 87 I. C. 557.—REP.]

T. S. V.

Spencer and Madhavan Nair, JJ.
8th September, 1925.
C. M. S. A. No. 43 *of* 1923.

Civil Procedure Code, S. 47—*Mortgage suit—Defendant exonerated—Claim petition—Remedy—Appeal or suit.*

A defendant in a mortgage suit was exonerated on his setting up a plea of title paramount. In execution proceedings, he put in a claim petition under S. 47, Civil Procedure Code. *Held,* though exonerated, he was still a party to the suit, and against the order on the claim petition an appeal lay. 23 Mad. 361 followed.

R. Ganapathi and *N. Panchapakesa Aiyar* for Appellant.

K. S. Jayarama Aiyar for Respondent.

T. S. V.

Odgers and Viswanatha Sastri, JJ.
8th September, 1925.
S. A. No. 182 *of* 1923.

Civil Procedure Code, S. 47—*Defendant struck off—Consent of parties—Claim petition—Order on—Suit to challenge—If lies.*

One of the defendants in a suit was struck off, with the consent of parties, his costs being payable by the plaintiff. A claim petition put in by him during execution was allowed and thereupon the decree-holder instituted a suit challenging the correctness of the order. *Held,* the suit was barred under S. 47 as he was still a party to the suit and the effect of the order striking off was only tantamount to a dismissal.

M. Patanjali Sastri for Appellant.

K. P. Padmanabha Pillai for Respondent.

T. S. V.

The Chief Justice and Reilly, J.
11th September, 1925.
A. S. No. 81 *of* 1923.

Contract—Sale of goods—Goods left with seller—Pledge by him—Failure to deliver—Rights of buyer.

A buyer of goods left them with the seller asking him to send them on whenever asked to do so and gave credit to the seller for the price in his account books. Shortly after the seller pledged the goods on his own account and failed to deliver the goods when demanded. The buyer then debited the seller with the original purchase price. *Held,* though the property in the goods had passed to the buyer, inasmuch as the

seller could not recover the purchase price, the buyer is so entitled to debit the original purchase price and not merely the price of the goods as on the date of conversion, *i. e.*, the pledge by the seller. *Chinery* v. *Viall*, 5 Hur. and Nor. 288 followed.

P. Venkatramana Rao for Appellant.

K. S. Krishnaswami Aiyar and *C. Rama Rao* for Respondent.

T. S. V.

Devadoss and Waller, JJ.
14th September, 1925.

C. M. A. No. 31 of 1919.

Civil Procedure Code, S. 73 and O. 21, R. 71—Default of purchaser—Resale—Deficiency in price realised—If assets under S. 73—Decree-holder—Who is—If can apply only for amount due to him.

Where on a resale held on account of the default of the purchaser, a deficiency in the sale price occurs and that amount is realised, it forms "assets" within the meaning of the term in S. 73, Civil Procedure Code.

"The decree-holder" referred to in O. 21, R. 71 is the particular decree-holder at whose instance the sale took place. For the purpose of realising the deficiency he does not represent the other decree-holders, but when once the deficiency is realised by him he holds it on behalf of the other decree-holders also.

Under O. 21, R. 71 the decree-holder can apply for realising only the total amount of the deficiency, and he cannot confine his application to the amount due to him under the decree.

T. V. Venkatrama Aiyar for Appellant.

S. Varadachari and *A. Krishnaswami Aiyar* for Respondents.

T. S. V.

Viswanatha Sastri, J.
14th September, 1925.

S. A. No. 189 of 1923.

Indian Contract Act, S. 251—Restriction on powers of borrowing—Notice—Liability.

In a partnership consisting of four persons, one provided capital and the others were not entitled to spend money without his permission but there was no express prohibition in the

agreement against their powers of borrowing. Moneys were lent by the plaintiff to the partners who had not contributed capital and it was found that the plaintiff had notice of an agreement not to borrow without the consent of the capitalist partner. *Held*, the latter was not liable for the amounts borrowed as the plaintiff had notice of the restrictions.

A. Krishnaswami Aiyar for Appellant.

The Advocate-General and *T.D. Srinivasachari* for Respondent.

T. S. V.

Devadoss and Waller, JJ. 15*th September*, 1925. } *C. M. A. No.* 167 *of* 192?.

Madras Estates Land Act, S. 3 (2) (*a*) *and* (*c*)—*Grant by Moghul King—Enfranchisement—Inam register referring to lands as jagir—If an estate.*

A whole village was granted by one of the Moghul Emperors to a Mahomedan as *khairati* and it was subsequently enfranchised by the British Government, and title deed issued and in the extract from the *Inam* fair register the words *Jagir, Jagirdars, Shrotriemdars* and *Inams* appeared simultaneously with reference to the village. In a suit for ejectment, *held*, the use of these words is not conclusive as regards the tenure and the village does not fall within S. 3 (2), clauses (*a*) or (*c*) of the Estates Land Act. 40 Mad. 664 ; 48 M.L.J. 654 followed.

A. Krishnaswami Aiyar and *K. Kameswara Rao* for Appellant.

S. Varadachari and *C. Sambasiva Rao* for Respondent

T. S. V.

The Chief Justice and Reilly, J. 16*th September*, 1925. } *A. S. No.* 68 *of* 1922.

Registration Act, S. 77—*Remedy given if optional—Denial of execution and refusal to register—Registration refused after enquiry—Suit for specific performance of original agreement to sell—If lies.*

In pursuance of an agreement to sell immoveable property, the defendants executed a sale deed, but when the plaintiff presented it for registration, one of the defendants denied execution. As the result of an enquiry by the District Registrar as to the fact of registration, he refused registration. The plaintiff,

instead of suing for compulsory registration under S. 77 (1) of the Registration Act, sued the defendants for specific performance. *Held*, the suit was not maintainable. 16 Mad. 342; 43 Mad. 822 followed. 7 A. L. J. 887; 44 I. C. 361 dissented from.

A. Krishnaswami Aiyar and *P. C. Venkatramayya* for Appellant.

G. Lakshmanna and *V. Viyanna* for Respondent.

T. S. V.

Jackson, J.
18*th September*, 1925.

Cr. Rev. Case No. 303 *of* 1925.

Penal Code, S. 405 *and Criminal Procedure Code, Ss.* 179, 181 (2)—*Criminal breach of trust—Where triable—Consequences of act—If give jurisdiction.*

The fact that the consequences of an act amounting to a criminal breach of trust occur at a place different from where the offence was committed, does not give the Court in the former place jurisdiction to try the accused for the offence under S. 405. 38 Mad. 639; 39 Mad. 576 followed.

S. A. Seshadri Aiyangar for Petitioner.

The Public Prosecutor for the Crown.

T. S. V.

Spencer and Madhavan Nair, JJ.
21*st September*, 1925.

C. R. P. No. 553 *of* 1922.

Madras District Municipalities Act (*V of* 1920), *S.* 249 *and Sch. V, cl.* (*o*)—*Storing rice—License if required—"Grain" if includes rice.*

The term "grain" in Sch. V, cl. (*o*) of the District Municipalities Act does not include rice and no license is necessary in respect of a godown where rice alone is stored for purposes of wholesale trade. (1896) A. C. 457 followed.

B. Sitarama Rao and *P. Marthandam* for Petitioner.

M. S. Vaidyanatha Aiyar for Respondent.

T. S. V.

Odgers and Viswanatha Sastri, JJ.
21st September, 1925.

S. *A. No.* 1734 *of* 1922.

Civil Procedure Code, O. 41, *R.* 17—*Appellant's vakil absent—Junior applying for adjournment and on refusal reporting no instructions—Effect of—Power to decide appeal on the merits—Remedy of aggrieved party.*

On the date of hearing of an appeal, the senior vakil of the appellant was absent and the junior asked for an adjournment. The same being refused, he stated he had no instructions to proceed with the appeal. The Court after considering the merits dismissed the appeal *Held*, (1) in the circumstances there was no appearance by party or pleader, and the mere fact that the appellant was present in person was quite immaterial. 30 Mad. 274 ; 22 C. L. J. 72 followed ; the withdrawal of vakalat was not necessary, the reporting of " no instructions " being quite sufficient. 34 Lah, 403 ; 20 L. W. 427 referred to.

(2) The Court had no power under O. 41, R. 17 to decide the appeal on the merits. 43 M. L. J. 317 followed ; 35 All. 105 dist. ; and

(3) the proper remedy was not to treat the order as one under O. 41, R. 17 and refer the aggrieved party to his remedy under O. 41, R. 19 but to set it aside on second appeal. Case-law discussed.

Salem Ramaswami Aiyar for Appellants.

K. Y. Adiga, M. S. Vaidyanatha Aiyar and *T. Appaji Rao* for Respondents.

T. S. V.

Devadoss and Waller, JJ.
21st September, 1925.

C. M. P. No. 1832 *of* 1924.

Limitation Act, S. 5—*Applicability—Laccadive Islands.*

The Limitation Act has not been extended to the Laccadive Islands and hence the High Court has no jurisdiction to excuse the delay in filing a memorandum of appeal under S. 5 of the Limitation Act. History of the Laccadives traced. 30 Mad. 665 held not to be correctly decided.

K. P. Padmanabha Pillai for Petitioner.

The Government Pleader and *B. Pocker* for Respondent.

T. S. V.

N R C

Spencer and Madhavan Nair, JJ.
21st September, 1925.

C. M. P. No. 982 *of* 1923.

Civil Procedure Code, O. 20, R. 1—Failure to give notice of judgment—Application to vacate judgment—Pendency of—Time if can be deducted for purposes of appealing—Limitation Act, S. 5.

After judgment was delivered in an appeal, the respondent therein applied to the Court to vacate the judgment and to declare the appeal pending on the ground that no notice of delivery of judgment was given to him as required by O. 20, R. 1, Civil Procedure Code. *Held*, for purposes of filing a second appeal, he was entitled to a deduction of the time during which his application was pending under S. 5, Limitation Act.

D. Ramaswami Aiyangar for *C. S. Venkatachari* for Petitioner.

C. Aiyasami Sastri for Respondent.

T. S. V.

Devadoss and Waller, JJ.
22nd September, 1925.

C. M. A. No. 15 *of* 1924.

Probate—Application for—Duty of Court—Validity of the dispositions—If can be gone into.

When probate of a will is applied for, the Court can only decide if the will propounded is true. It is not open to that Court to go into the question whether the dispositions contained in the will are valid.

S. Varadachari and *N. S. Rangasami Aiyangar* for Appellant.

T. Rangachari, A. Krishnaswami Aiyar and *M. Patanjali Sastri* for Respondent.

T. S. V.

Devadoss and Waller, JJ.
22nd September, 1925.

C. M. A. No. 438 *of* 1924.

Provincial Insolvency Act (V of 1920), Ss. 4, 56 (3)—Official Receiver—Position of—Order directing Receiver to take possession—Insolvent's right to present possession—Procedure.

The position of an Official Receiver is the same as that of a Receiver appointed under O. 40, Civil Procedure Code. The Court cannot under S. 56 (3) order a stranger to hand over to

the Receiver possession of properties to which the insolvent is not entitled to present possession. The proper procedure in such a case is to put in an application under S. 4, and not to treat the order under S. 56 (3) as one passed under S. 4. Practice of adopting loose procedure in insolvency proceedings in the mofussil deprecated.

K. Bhashyam Aiyangar and *S. Rajagopalachari* for Appellant.

K. R. Rangaswami Aiyangar and *R. Krishnaswami* for Respondent.

T. S. V.

Spencer and Madhavan Nair, JJ.
23rd September, 1925. — *C. R. P. No.* 644 *of* 1923.

Chit fund—If a lottery—Suit for recovering moneys paid—If lies—Indian Contract Act, S. 65*—Effect of.*

A chit fund was started with 500 subscribers. A subscriber was to subscribe Rs. 2 per month and could borrow money on security. A prize was drawn by casting lots at the end of each month, the winner getting a prize of Rs. 100 and thereafter having no connection with the fund. At the end of 50 months, the chit was to come to an end, and those who had won no prize up to then would get back Rs. 100 each, being the amount of their subscription. After a certain number of drawings, the chit transaction collapsed and one of the subscribers sued for the amounts subscribed by him. *Held*, he could not recover. The transaction amounted to a lottery, the prize winning depending on mere chance ; nor could the plaintiff invoke the aid of S. 65, Indian Contract Act. Opinion of Odgers, J. in 47 M. L. J. 847 followed ; 21 L. W. 403 dissented from ; case-law discussed.

A. N. Krishna Aiyangar for Petitioner.

K. V. Srinivasa Aiyar for Respondent.

T. S. V.

Phillips and Ramesam, JJ.
23rd September, 1925. — *A. S. No.* 259 *of* 1921.

Aliyasantana Law—Inheritance—Branch partitioning off—Right of a member of the branch to succeed to a member of the other—Pollution observance necessary.

In an *Aliyasantana* family, a partition took place as a result of which one branch separated off from the family. A member of the separated branch claimed to succeed to the properties left by a member of the other, while the Government claimed the same by escheat. *Held*, it was not sufficient to prove the partition, but the claimant must also prove that there was observance of pollution as between him and the deceased. Sundara Aiyar's "Malabar and Aliyasantana Law," p. 194 followed.

The Government Pleader for Appellant.

B. Sitarama Rao and *K. Y. Adiga* for Respondent.

T. S. V.

Ramesam, J.
24th September, 1925. } *C. R. P. No.* 924 *of* 1924.

Madras District Municipalities Act, S. 50—*Failure to attend meetings for three consecutive months—Restoration—Fresh oath of allegiance, if necessary—Member of Taluq Board elected to District Board—Restoration to Taluq Board—Effect of.*

Where a member of a District Board fails to attend the meetings of the Board for three consecutive months and thereafter is restored to the Board under S. 50 (4), no fresh oath of allegiance need be taken by him, as he does not become a new member for a fresh term of three years. He is only restored to membership for the remaining term of his three years' period.

If a member of a Taluq Board who had been elected to the District Board loses his membership of the former by failing to attend meetings for three consecutive months and is thereafter restored to membership under S. 50 (4), he does not *ipso facto* become restored to the District Board membership. Without being again elected to the District Board, he cannot take part in its proceedings. C. R. P. Nos. 169 and 254 of 1924 followed.

T. M. Krishnaswami Aiyar and *V. Ganapathi* for Petitioner.

S. Varadachari for Respondent.

T. S. V.

Odgers and Viswanatha Sastri, JJ.
24th September, 1925.

S. *A. No.* 73 *of* 1923.

Madras Estates Land Act, S. 111—*Rent sale—Suit to set aside—Want of notice, proclamation, etc.—If maintainable in Civil Court—C. P. Code, O.* 21, *R.* 92 (3)—*Applicability.*

A suit lies in the Civil Court to set aside a rent sale under S. 111 of the Estates Land Act for want of notice, proclamation of sale, etc. The right of suit is not taken away by the mere circumstance that the defaulting ryot made an infructuous application to have it set aside under S. 131 of the Act. O. 21, R. 92 (3) does not apply to such a case.

B. Sitarama Rao and *S. R. Muthuswami Aiyar* for Appellant.

A. Venkatrayaliah and *L. Venkatanarasayya* for Respondent.

T. S. V

Odgers and Viswanatha Sastri, JJ.
25th September, 1925.

S. A. No. 475 *of* 1923.

Madras Estates Land Act, Ss. 52, 53, 112—*Tender of patta by landlord—Increase of rent over and above that in prior patta—Non-acceptance of patta—Sale of holding—Suit to contest——Validity of patta tendered if can be gone into.*

A tenant who had been holding under a patta originally granted for a period of one year was tendered another patta in which the rent was increased and a larger acreage shown as included in his holding. He refused to accept it and failed to pay the rent, whereupon the landlord had the holding sold under the provisions of the Estates Land Act. The tenant sued under S. 112 to have the sale set aside. *Held*, the Court had power to decide whether the patta tendered was one which the tenant was bound to accept and it was not obligatory on the landlord to proceed first under S. 56 to enforce patta. There is no inconsistency between S. 52 (3) and S. 53 of the Act. Observations of Napier, J. in 6 L. W. 108 dissented from.

N R C

Per Viswanatha Sastri, J.—A decision in such suit that the patta tendered is a proper one amounts to decreeing the patta within the meaning of S. 52 (3).

M. Patanjali Sastri for Appellant.

K. Kuttikrishna Menon for Respondent.

T. S. V.

Odgers and Viswanatha Sastri, JJ. *28th September*, 1925. — *S. A. No.* 576 *of* 1923.

Easements Act, S. 15—*Enjoyment for* 40 *years against Government—Darkhast grant to private person—Claim of easement against private owner.*

Where a person was enjoying an easement right for a period of forty years against the Government and thereafter the Government assigned the lands on *darkhast* to a private person, a right of easement cannot be claimed against such person unless it is prescribed against him by twenty years' enjoyment, quite apart from the 40 years' period against the Government. 41 Mad. 622 followed.

K. Y. Adiga for Appellant.

B. Sitarama Rao for Respondent.

T. S. V.

Reilly, J. *29th September*, 1925. — *C. R. P. No.* 1091 *of* 1923.

Civil Procedure Code, O. 21, *R.* 29—*Application necessary—Lodgment schedule—If sufficient.*

An application is necessary before a sale can be set aside under O. 21, R. 89, C. P. Code. A lodgment schedule containing a recital that the amount was paid for countermanding the sale cannot be treated as such. (1922) M. W. N. 171 followed.

S. Subramania Sastri for Petitioner.

K. Kameswara Rao for Respondents.

T. S. V.

The Chief Justice and Reilly, J. *30th September*, 1925. — *O. S. A. No.* 83 *of* 1925.

Insolvency—Partition suit—Maintenance directed to be paid to insolvent—Omission to pay in whole—Arrears—If vest in Official Assignee.

In a suit for partition, a Receiver was appointed and he was directed to pay the 1st defendant in the suit certain

amounts by way of maintenance allowance. The Receiver did not pay in full the monthly amount fixed. The defendant was adjudicated insolvent and applied for payment of the arrears of maintenance due to him. *Held*, he was not entitled to it, as it had vested in the Official Assignee. Under S. 60 (*n*), C. P. Code, it is only the right to future maintenance that is exempt from attachment and not arrears of maintenance due and hence it vests in the Official Assignee.

R. N. Aingar and *King and Partridge* for Appellant.

V. C. Gopalaratnam for Respondent.

T. S. V.

Phillips, J.
2nd October, 1925. } *C. R. P. No.* 385 *of* 1925.

Civil Procedure Code, O. 21, R. 103—Suit under—Application for temporary injunction—Power of Court to grant.

In a suit under O. 21, R. 103 by a defeated obstructor, a Court has no power to issue a temporary injunction restraining the decree-holder from executing his decree for possession: O. 39 read with S. 94, C. P. Code, was exhaustive of the cases under which injunctions could be granted, and apart from those provisions the Court had no inherent jurisdiction to grant an injunction. 43 Mad. 94 ; 47 Mad. 171 ; 46 All. 144 folld. ; 73 I. C. 909 dissented from.

K. Ramamurthi for Petitioner.

A. Ramaswami Aiyangar for *K. Kameswara Rao* for Respondent.

T. S. V.

Devadoss and Waller, JJ.
5th October, 1925. } *C. M. A. No.* 373 *of* 1924.

Madras Village Courts Act (as amended by Act II of 1920), *S.* 78*—Rules framed under—Validity of—R.* 18 (*b*) *if excludes jurisdiction of Civil Courts.*

A suit was filed in a Civil Court for a declaration that the election of the members of a Village Panchayat Court was invalid on account of non-compliance with the rules framed under S. 78 of the Madras Village Courts Act as amended by Act II of 1920. *Held*, (1) the jurisdiction of the Civil Courts was excluded by R. 18 (*b*) framed by the Local Government under S. 78 ; (2) where a new right and a new jurisdiction are created by statute, the decision of the new tribunal is exclusive and final ;

and (3) the rules framed under S. 78 are not *ultra vires.* 31 Bom. 604 ; 47 Mad. 325 followed.

P. Satyanarayana Rao for Appellant.

V. Ramadoss for Respondent.

T. S. V.

Viswanatha Sastri, J.
5th October, 1925. } *S. A. No.* 327 *of* 1923.

Inam—Karnam service—Usufructuary mortgage of unenfranchised inam—Redeemable after 15 *years—Subsequent sale of equity of redemption—Later enfranchisement in favour of mortgagor-vendor—Suit by, for possession,* 13 *years after mortgage and* 10 *years after sale—Expiry of* 15 *years from mortgage and* 12 *years from sale on date of decree—Form of decree—Cause of action—Accrual of, subsequent to plaint—Whether Court can take notice of.*

A Karnam mortgaged with possession his unenfranchised service inam land in July, 1907. The mortgage was redeemable only after 15 years. He sold the equity of redemption to the same mortgagee (who was in possession) in April, 1910. The inam was enfranchised in the name of the Karnam in 1911. He brought this suit for possession in 1920 alleging that the mortgage and sale were void.

Held, that though the mortgage of 1907 was void, the mortgagee in possession had prescribed for a mortgagee interest by 1919. 41 M. L. J. 194 followed.

The suit in 1920, if treated as a suit for redemption, was premature as the 15 years had not expired from the mortgage.

But as that period had expired by the date of the decree in appeal, *held*, the Court could take notice of this subsequent event and pass a decree for possession conditional on the plaintiff refunding the mortgage money. (1916) 1 M. W. N. 364 and (1918) M. W. N. 89 and 199 followed.

Held further the plaintiff must also refund the price of the equity of redemption and the value of improvements made by the defendant while in possession.

Held further that the subsequent invalid sale in 1910 did not alter the character of the defendant's possession and that the could not prescribe for an absolute title by the lapse of 12 years from that date. 14 Bom. 279 and 14 Mad. 38 relied on.

Y. Suryanarayana for Appellant.

K. N. Rajagopala Sastri for *B. Satyanarayana* for Respondent.

T. S. V.

Viswanatha Sastri, J.
5th October, 1925.

C. R. P. No. 853 *of* 1923.

Contract Act, S. 45—*Joint promissees—Promise to two persons that on their paying in moneys into the treasury and showing receipt to promissor, they would be repaid the money—Payment and showing of the receipts by one of the promissees—Suit by him alone to recover the money—Whether maintainable.*

Where the defendant executed a contract in favour of the plaintiff and another that on their paying in moneys into the treasury on his account and showing the receipts to him he would repay the moneys so paid with interest, and the plaintiff alone made the payment and showed the receipts, *held*, the plaintiff and the other party were not co-promissees within the meaning of S. 45 of the Contract Act. On a true construction of the contract, the promise was to the person or persons making the payment, and not to the plaintiff and the other jointly. The plaintiff's suit was rightly decreed, and was not bad for non-joinder.

L. S. Veeraraghava Aiyar for Petitioner.

K. N. Rajagopala Sastri for *B. Satyanarayana* for Respondent.

T. S. V.

The Chief Justice, Krishnan and Beasley, JJ.
6th October, 1925.

In the matter of a High Court Vakil.

Letters Patent (Madras), cl. 10—*Negligence—If amounts to professional misconduct.*

Negligence by itself will not amount to professional misconduct unless an element of moral delinquency enters into the transaction alleged. 86 Law Times Reports 468 referred to.

Where owing to the fraud of his clerk, a vakil did not pay into Court certain printing charges, though the client had remitted moneys in due time and as a result the case was dismissed for default, no question of professional misconduct on the part of the vakil arises.

The Advocate-General for the Crown.

P. Venkatramana Rao for the Vakil and *T. R. Ramachandra Aiyar* for the Vakils' Association.

T. S. V.

N R C

The Chief Justice and Viswanatha Sastri, J. *6th October*, 1925. } *A. S. No.* 356 *of* 1924.

Criminal Procedure Code, S. 107—*Petition for binding over—Police enquiry—Dismissal without notice—Suit for damages for malicious prosecution and defamation—Maintainability—Statements made to the Police—Privilege.*

The defendant presented a petition to a Magistrate to take action under S. 107, Criminal Procedure Code, against the plaintiff. The Magistrate sent it to the police for enquiry, who after hearing the defendant reported that the allegations in the complaint were unfounded. The Magistrate thereupon dismissed the petition without even issuing notice to the plaintiff. In a suit by the plaintiff for damages for malicious prosecution and defamation contained in the petition and in the statements to the police, *held*, (1) as there was no prosecution, a suit for malicious prosecution will not be sustainable ; and (2) the statements were privileged and no suit for defamation could be sustained. (1905) A. C. 480 ; 2 Weir 51 ; 1 Lord Raymond 454 ; 35 I. C. 813 ; 40 All. 341 ; 48 Cal. 388 referred to.

Sir K. V. Reddy and *P. V. Rangaram* for Appellant.

S. Ranganatha Aiyar for Respondent.

T. S. V.

Odgers and Viswanatha Sastri, JJ. *6th October*, 1925. } *S. A. No.* 186 *of* 1923.

Hindu Law—Adoption—Consent of father-in-law—Adoption made long after his death—Consent of sapindas *if to be expressly asked for and obtained—Inference from omission to object.*

A Hindu widow who had obtained the consent of her father-in-law to adopt a son did nothing for a long time and 19 years after his death adopted a son. One of the nearest *sapindas* gave his son in adoption, another took the boy in adoption on her behalf, while two others who knew of what was taking place did not object to the adoption. *Held*, the adoption was valid, and it was not necessary that the consent of the *sapindas* should have been expressly asked for. From their conduct in taking part in the adoption and failing to object when there was knowledge of what was happening, the same can be inferred. Case-law discussed.

P. R. Ganapathy Aiyar and *K. Venkatrama Raju* for Appellant.

S. Varadachari and *P. Bapiraju* for Respondents.

T. S. V.

Odgers and Viswanatha Sastri, JJ.
6th October, 1925. } *S. A. No.* 444 *of* 1923.

Hindu Law—De facto *guardian—Alienation—Validity—Ratification by minor after attaining majority—Effect of.*

An alienation made by the maternal uncle of a Hindu minor acting as his *de facto* guardian stands on the same footing as an alienation by a *de jure* guardian. It is only voidable and not void. If after attaining majority, the minor ratifies it, the alienation will be binding on him irrespective of whether it was for necessity or not. 6 M. I. A. 393 ; 20 Cal. 820 ; 14 Bom. 562 and other cases referred to.

K. Subba Rao for *V. Ramdoss* for Appellants.

P. Satyanarayana Rao for Respondent.

T. S. V.

Jackson, J.
8th October, 1925. } *C. R. P. No.* 30 *of* 1925 and *C. M. P. No.* 3199 *of* 1925.

Court Fees Act, S. 7, cl. 9—Suit for redemption and damages—Compensation for improvements claimed by tenant—Malabar Compensation for Tenants' Improvements Act (*I of* 1900), *S. 6—If Court-fee payable on damages claimed—Set-off against improvements—Civil Procedure Code, O.* 47, *R.* 1*—If Court can review a wrong decision.*

Where in a suit for redemption of a *kanom*, the plaintiff claimed a large amount by way of damages, exceeding the pecuniary jurisdiction of the Munsiff in whose Court the suit had been filed, and which he claimed to set off against the *kanom* amount and value of improvements claimed by the tenant, and the Court directed the plaintiff to pay Court-fee on the damages claimed and to bring the valuation within the Munsiff's jurisdiction, *held*, no Court-fee is payable in a redemption suit on damages which have to be set off against the value of improvements claimed and no question of jurisdiction arises. 33 M. L. J. 463 ; 25 I. C. 704 ; 5 M. 284 (F. B.) followed.

Where a Court has given a wrong decision, but it has not affected the rights of the parties and the question arising is

one of general importance, it can review its decision. 43 M. L. J. 332 (P. C.) ; 7. M. 307 followed.

K. P. Ramakrishna Aiyar for Petitioner.

A. Parameswara Aiyar for Respondent.

T. S. V.

Spencer, J.
8th October, 1925. } *S. A. No.* 551 *of* 1921.

Civil Procedure Code, S. 96—*Right to appeal—Who is entitled to—Party who has assigned away his rights but continues in possession as lessee:*

Where in a suit in ejectment one of the defendants had assigned away his rights over the suit property but continued in possession as a lessee, and a decree was passed against all the defendants, *held,* the assignor-defendant was entitled to prefer an appeal as he was a person in possession and aggrieved by the decree in ejectment.

P. Govinda Menon for *K. P. M. Menon* for Appellant.

K. P. Ramakrishna Aiyar and *K. P. Mahadeva Aiyar* for Respondents.

T. S. V.

Jackson, J.
9th October, 1925. } *C. M. S. A. No.* 52 *of* 1923.

Civil Procedure Code, O. 21, *Rr.* 22, 90—*Notice under—Service recorded, but later proved not proper—Application to set aside sale—Limitation Act, Arts.* 166, 181.

Where in an execution sale the notice prescribed by O. 21, R. 22 was recorded as served but it subsequently transpired that the service was not properly effected, an application to set aside the sale on the ground of such defect is still governed by the 30 days' period of limitation under Art. 166, Limitation Act and not by Art. 181.

A. Krishnaswami Aiyar for Appellant.

A. V. Viswanatha Sastri for Respondent.

T. S. V.

Phillips, J. } C. R. P. No. 1014 *of* 1924.

Civil Procedure Code, S. 141, *O.* 9, *R.* 9—*Dismissal of suit for default—Application to restore suit dismissed for non-payment of batta—Application to restore former application—Whether lies under O. 9, R 9.*

The plaintiff's suit was dismissed for default on the ground of the non-appearance of the plaintiff and his pleader. An application to set aside the order of dismissal for default was itself dismissed for failure to pay batta. Another application was filed to restore the first application to file. *Held*, in revi-n against the order restoring the petition to file on the nd that O. 9, R. 9 of the Civil Procedure Code does not y to an application that (1) O. 9, R. 9 applies to such an ication and S. 141 of the Civil Procedure Code has ex-led the provisions of the Code, *i. e.*, O. 9, R. 9, to such an lication. 44 Cal. 950 ; 1 Lah. 339 and 18 Bom. 59 cited l approved. 17 All. 106 (P. C.) distinguished. 4 Pat. L. J. 5 (F.B.) ; 1 Pat. L. J. 135 not approved.

P. Satyanarayana Rao for Petitioner.

P. Somasundaram and *P. Satyanarayana* for Respondents.

C. A. S.

Phillips and Ramesam, JJ. } *A. S. Nos.* 144 & 145 *of* 1922 and *A. S. No* 3 *of* 1923.

*Conflict of laws—Submission to jurisdiction—Execution of a power-of-attorney to agent to conduct litigation in foreign Court—Whether amounts to submission—Partnership—Partners removing themselves from the place of business—Whether terminates partnership—Persons invoking jurisdiction of a Court—Not entitled to deny jurisdiction of the Court when sued in a foreign Court—C.P. Code, S.*13—Res judicata—*Assignee of a foreign decree brought on record by foreign Court after finding the assignment was valid—Decision binding upon Indian Courts—Foreign* ex parte *decree—Whether merely on that account one not given on the merits.*

The execution of a power-of-attorney authorising an agent to conduct litigation in a foreign Court is submission to the jurisdiction of that Court. 37 Mad. 163 and 47 Mad. 877 followed.

The mere fact that partners ran away from their place of business does not terminate partnership.

Where the defendants' firm filed suits in a foreign Court, they cannot be allowed as defendants to deny the jurisdiction which they themselves invoked as plaintiffs. S. A. No. 1492 of 1920 referred to.

Where the assignee of a foreign decree has been brought on record in the foreign Court, the finding as to the validity of the assignment is conclusive on the Indian Courts under S. 13 of the Civil Procedure Code. A foreign decree passed *ex parte* does not merely on that account become a decision not passed on the merits. 47 Mad. 877 approved.

V. Narayanan and *A. Krishnaswami Aiyar* for Appellants.

K. Narasimha Aiyar for Respondents.

C. A. S.

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Odgers, J. } *C. R. P. Nos. 990 to 999 of 19*

Contract—Consideration—Promise to subscribe for a S ... gham—Incurring of obligation by the plaintiff on such a prom ... —Whether the plaintiff can sue and recover on such a promise.

On the strength of the promise made by the defendants ... subscribe for a Sangham, the plaintiff entered into various obliga-tions and incurred expenditure. In a suit brought by the plain-tiff for recovery of the amounts promised, it was contended by the defendants that it was a mere voluntary promise not sup-ported by consideration and therefore not enforceable and that the Panchayat Court has no jurisdiction as this is not a claim based on contract.

Held, that even voluntary subscriptions are enforceable as contracts under certain circumstances. 14 Cal. 64 ; (1918) M. W. N. 173 followed. 36 All. 268 referred to.

R. Kuppusami Aiyar for Petitioner.

S. Nataraja Nadar for Respondent.

C. A. S.

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Phillips, J. } *C. R. P. No. 908 of 1923.*

Civil Procedure Code, O. 20, R. 4—Judgment of the Court of Small Causes—No reasons given—Whether judgment in accord-ance with law.

A judgment of the Provincial Small Causes Court which merely records findings on the points for decision without record-ing any reasons whatever is not one in accordance with law.

C. A. Seshagiri Sastri for Petitioner.

N. S. Srinivasa Aiyar for *M. S. Venkatrama Aiyar* for Respondent.

C. A. S.

Devadoss and Waller, JJ. } *L. P. A. No. 28 of* 1924.

Evidence Act, S. 116—*Landlord and tenant—Person having no title letting tenant into property—Notice of eviction by real owner—Attornment by tenant to real owner under threat of eviction—Suit in ejectment by the person who originally let tenant into possession—Estoppel.*

Where the plaintiff who had no title to a land let the defendant as tenant into possession of the property and subsequently the Government who was the real owner of the property gave the defendant, the tenant, notice of eviction from the land under S. 6 of the Madras Land Encroachment Act and the defendant under the threat of eviction executes a muchilika to the Government in a suit by the plaintiff to eject the defendant, *held,* that the threat of eviction by the Government who was the paramount owner followed by the attornment of the defendant by the execution of the muchilika constituted a valid eviction of the defendant by title paramount and he is not estopped from questioning the right of the plaintiff to recover the property. The tenant is not estopped under S. 116 of the Evidence Act from questioning the title of the plaintiff to eject. 107 English Reports 113 followed.

S. Muthiah Mudaliar for Appellant.

C. A. Seshagiri Sastri for Respondent.

C. A. S.

Spencer and Madhavan Nair, JJ. } *C. M. S. A. No.* 140 *of* 1923.

Provincial Insolvency Act, Ss. 20, 51 *and* 52—*Interim Receiver in insolvency—Sale of insolvent's property in execution of a decree—Notice by interim Receiver to the executing Court prior to sale of his appointment—Possession not taken by the interim Receiver prior to sale—Validity of execution sale—Whether Ss.* 51 *and* 52 *apply to interim Receivers.*

Where a sale in execution of a decree against the insolvent takes place notwithstanding the appointment of an interim Receiver of his properties in insolvency and notice given by such

interim Receiver to the executing Court of his appointment in a case where such interim Receiver has not taken possession of the properties, there is no illegality or irregularity in the execution sale and a valid title will pass to the auction purchaser.

Where a Receiver is appointed for certain properties, an execution sale of those properties is valid even though leave of the Court appointing a Receiver is not obtained, in cases where the Receiver has not obtained possession of the properties.

Ss. 51 and 52 of the Provincial Insolvency Act do not apply to the case of an interim Receiver in insolvency.

T. R. Ramachandra Aiyar for Appellant.

T. M. Krishnaswami Aiyar, S. Subramania Aiyar and *C. A. Seshagiri Sastri* for Respondents.

C. A. S.

Odgers and Madhavan Nair, JJ. } *C. M. A. No.* 159 *of* 1923.

Religious endowment—Removal of hereditary trustee for misconduct—Hereditary rights of his son not forfeited.

Where a hereditary trustee of an endowment is removed by a Court for misconduct, the hereditary rights of his son to the trusteeship are not thereby forfeited. 9 M. L. T. 495; 6 M. L. J. 254 followed.

N. R. Govindachari for Appellant.

C. A. Seshagiri Sastri for Respondent.

C. A. S.

Jackson, J.
2nd October, 1925. } *C. R. P. No.* 7 *of* 1925.

Civil Procedure Code, O. 21, R. 89—Sale of judgment-debtor's property in execution of money decree—Interim Receiver of the estate of the judgment-debtor appointed in his insolvency prior to sale—Right of interim Receiver to apply under O. 21, R. 89—Provincial Insolvency Act, S. 20,

Where the Official Receiver of Tanjore appointed as Interim Receiver under S. 20 of the Provincial Insolvency Act of 1920 applies without sanction of the Court under O. 21, R. 89 of the Civil Procedure Code to set aside the sale of the properties of the judgment-debtor against whom the petition in insolvency has been filed, which was made in execution of a money decree against him some time before the appointment of the interim Receiver :

Held, that the property of the judgment-debtor does not vest in the interim Receiver under S. 20 of the Provincial Insolvency Act of 1920 and that the mere appointment of a Receiver for the preservation of the property without conferring the powers mentioned under O. 40, R. 1, cl. (*d*) of the Civil Procedure Code cannot entitle the Receiver to apply under O. 21, R. 89.

Held, therefore, that the Receiver cannot be said to be neither the owner of the estate nor can he be said to be a person holding any interest by virtue of a title acquired before sale. 28 Mad. 157 at 160 and 45 Mad. 167 distinguished.

C. V. *Anantakrishna Aiyar* for Petitioner.

S. *Varadachari* and *K. Balasubramania Aiyar* for Respondent.

C. A. S.

Od[illegible]
7th October, 1925. } *S. A. No.* 215 *of* 1922.

Suit for possession—Vacant site—Absence of acquisition of title by prescription by defendant—Rule that possession follows title applies.

In a suit for possession of a vacant site, the Court is entitled to presume that possession follows title and the plaintiff will be held to have been in possession within 12 years prior to suit in the absence of proof of title by prescription in the defendant.

Ch. Raghava Rao for Appellants.

N. Rama Rao for Respondents.

C. A. S.

Spencer, J.
8th October, 1925. } *S. A. No.* 350 *of* 1924.

Civil Procedure Code, S. 100—Decree against father—Execution and sale of property—Question whether the father's interest alone in the property passes or the entire interest of the father and the sons—Mixed question of law and fact—Whether sons were parties to suit or execution proceedings a material circumstance in the decision.

The question whether what is sold in execution of a decree against Mitakshara Hindu father is merely the father's interest in the property sold or the entire interest of the father and the sons is a mixed question of law and fact on which it is open to the High Court to interfere in second appeal. 13 M. 247;

36 M. 325 at 339; 27 M. 131 at 142 followed. 71 Cal. 584 at 589 referred to.

Where it is doubtful whether it is the father's interest alone that passed or the entire interest of the father and the sons, it is a material element for consideration whether the sons were parties to the suit or the execution proceedings.

C. A. Seshagiri Sastri for Appellant.

K. S. Jayarama Aiyar and *S. Nagaraja Aiyar* for Respondents.

C. A. S.

Devadoss and Waller, JJ. *9th October*, 1925. — *C. M. A. No.* 415 *of* 1924.

Provincial Insolvency Act, S. 51—*Deposit of* 25 *per cent. of the sale amount by the execution purchaser prior to the presentation of the insolvency petition—Whether amount deposited is assets realised under the section.*

The 25 per cent. deposit made by an auction purchaser prior to the presentation of an insolvency petition by the judgment-debtor is not assets realised for purposes of S. 51 of the Provincial Insolvency Act.

Ch. Raghava Rao for Appellant.

N. Rama Rao for Respondent.

C. A. S.

Devadoss and Waller, JJ. *9th October*, 1925. — *L. P. A. No.* 90 *of* 1924.

Hindu Law—Joint family—Alienation by de facto *manager*—Bona fide *purchaser—What passes to—Document silent as to what passes—Presumption.*

Where the *de facto* manager of a joint Hindu family alienates joint family property, but there is no recital in the document that what is sold is his own share or any reservation as to the shares of the other members of the family, the interest of the joint family as a whole passes to a *bona fide* purchaser. 34 All. 298 (P. C.) distinguished.

B. Somayya for Appellant.

N. Chandrasekhara Aiyar and *T. Kumaraswamiah* for Respondent.

T. S. V.

Devadoss and Waller, JJ.
9th October, 1925. } *L. P. A. No.* 106 *of* 1924.

Limitation Act, Art. 182—*Execution application—Order lodging or recording—If proper—Revival—Application when necessary—Joint and several decree—Execution against one—Effect.*

An execution application must be disposed of in one of the ways prescribed by the Code of Civil Procedure. There is no provision in the Code according to which a Court can direct such an application " to be lodged or recorded ". In spite of an order directing the petition to be recorded, the execution application must be deemed to be on the file of the Court, and no application is required to revive it, when it has not been in terms dismissed and no question of limitation arises. Practice of mofussil Courts " recording or lodging execution applications " condemned. 28 Mad. 50 (F. B.); 31 Mad. 71; 36 Mad. 55; (1923) M. W. N. 670 referred to.

Where a joint decree is passed against two persons to deliver up possession, and mesne profits are awarded against them severally with respect to the lands in the possession of each, the execution of the decree for mesne profits against one alone saves limitation for purposes of obtaining possession by execution against the other. 30 Mad. 268 ; 11 C. L. J. 83 followed.

T. M. Krishnaswami Aiyar and *K. P. Sarvothama Rao* for Appellant.

K. Srinivasa Rao for *B. Sitarama Rao* for Respondent.

T. S. V.

Jackson, J.
13th October, 1925. } *C. R. P. No.* 770 *of* 1923.

Evidence Act, S. 34—*Suit for balance of accounts—Evidence only of the account book and knowledge of witnesses derived from the same—No decision can be passed for the plaintiff on the evidence.*

Where in a suit brought upon balance of accounts due on dealings had by the defendant with the plaintiff the only evidence let in was that of the plaintiff's account books and one or two witnesses whose knowledge of the transaction was entirely derived from the account books themselves and a decree was passed thereon. *Held*, that there was no legal evidence

to support the decree inasmuch as there was no independent corroborative evidence of the dealings disputed as required by S. 34 of the Evidence Act and the decree should be set aside and suit dismissed.

A. Sundaram Aiyar for Petitioner.

R. Kesava Aiyangar for Respondent.

C. A. S.

Phillips, J. — 14*th October*, 1925. — *C. R. P. No.* 840 *of* 1923.

Indian Contract Act, S 23—Illegality of contract—Agreement to stifle of prosecution—A complaint for compoundable and non-compoundable offences—Notice to accused issued only for compoundable offences—Agreement of parties settling differences.

Where a complaint is made of offences some of which are compoundable and others are non-compoundable and the Magistrate issues a notice after examining the complainant only on the compoundable offences, an agreement between the parties settling their differences is not illegal as an agreement to stifle a prosecution, as there is no prosecution under the circumstances for a non-compoundable offence. 20 C. W. N. 946, followed.

V. Ramaswami Aiyar for Petitioner.

C. A. Seshagiri Sastri for Respondent.

C. A. S.

Spencer and Odgers, JJ. — 13*th October* 1925. — *S. A. No.* 324 *of* 1922.

Limitation Act, Art. 134—*Transferee from mortgagee—Title acquired—What he should prove.*

In order that a transferee from a mortgagee may establish that he had acquired a title as absolute owner of the properties under Art. 134, Limitation Act, it is necessary for him to establish that he bargained for and obtained from his transferor right as an absolute owner. It is not necessary for him to establish either *bona fides* or good faith in entering into the transaction. 34 M. L. J. 431; (1917) M. W. N. 5; 15 I. C. 609; 14 M.I.A. 1; A. S. No. 182 of 1921 referred to.

C. V. Anantakrishna Aiyar for Appellant.

T. M. Krishnaswami Aiyar and *A. Swaminatha Aiyar* for Respondents.

T. S. V.

Jackson, J.
13th October, 1925. } C. M. P. No. 3137 of 1925.

Civil Procedure Code, S. 148 and O. 33, Rr. 2 and 5—Schedule of property omitted—Return of application—Representation more than 30 days after decree—Power of Court to extend time.

When an application for leave to appeal *in forma pauperis* does not contain the schedule of property as required by O. 33, R. 2 and the papers being returned for correcting this omission are represented beyond the period of limitation prescribed by Art. 170, Limitation Act, the Court has no power under S. 148, Civil Procedure Code, or otherwise to extend the time for presentation of the application. Where the statutory requirements of O. 33, R. 2 are not complied with, the only course open to the Court is to reject the application 26 M. L. J. 343; 1 L. W. 1068 distd.

T. S. Venkatesa Aiyar for Petitioner.

T. S. V.

Phillips and
Ramesam, JJ.
14th October, 1925. } A. S. No. 21 of 1924.

Malabar Law—Karar—Powers of karnavan to borrow restricted—Creditor having knowledge of karar—Adult members to join—Failure to join—Family necessity—Effect of—Contract Act, S. 64—Applicability.

Under the terms of a *karar* in a Malabar *Tarwad*, power was given to the *karnavan* to borrow money to pay a specific debt of Rs. 3000, but it was expressly provided that the interest thereon was to be met out of the current income; also that all the adult members should join in all cases of borrowing. The plaintiff who had full knowledge of the *karar* lent the sum on the security of immoveable properties, being put in possession of the same in lieu of interest; but by a document of even date the properties were leased to the *Tarwad*, rent being made a charge on the property. Subsequently a further sum was borrowed for purposes of litigation, a mortgage document being executed by some only of the adults. The plaintiff sued to recover out of the *Tarwad* properties the moneys due under both the mortgages and also claimed to have a charge on the properties for the arrears of rent that had accrued due. *Held*, (1) the charge for rent created under the lease was not binding on the *Tarwad*. 11 M.L.J. 185; 16 I.C. 560 folld.; (2) that when money

is borrowed for expenses of a *Tarwad* there must be evidence to show that the money was spent for family purposes or that there was such a lack of *Tarwad* money that it was necessary to borrow; (3) the mortgage for litigation expenses was in contravention of the *karar*, as some of the adult members did not join and was not binding on the *Tarwad* properties. Nor was the matter one falling under S. 64, Contract Act. 35 Tr. L. R. 110; S. A. No. 615 of 1882 folld.; 35 M. L. J. 96; 22 Mad. 289; 43 Mad. 793 distd.

T. R. Ramachandra Aiyar and *S. Srinivasa Aiyar* for Appellant.

C. V. Anantakrishna Aiyar for Respondents.

T. S. V.

Venkatasubba Rao and Madhavan Nair, JJ. *14th October,* 1925. — *C. M. A. No.* 228 *of* 1924.

Guardians and Wards Act, Ss. 34 (*d*) *and* 43 (1)—*Order directing guardian to account for moneys—If appealable.*

Where on a guardian filing in Court accounts for a certain sum of money as representing the moneys of the minor in his hands, the Court orders him to pay into Court a further amount as money which he ought to account for, the order is one falling under S. 43 (1) and not under S. 34 (*d*) of the Guardians and Wards Act and is appealable. 55 I.C. 587; 67 I.C. 309 dissented from; 25 C. L. J. 149 folld.; 46 All. 458 referred to.

C. S. Venkatachari and *V. Narasimha Aiyangar* for Appellant.

S. Muthiah Mudaliar and *M. Krishna Bharati* for Respondent.

T. S. V.

Phillips, J. *14th October,* 1925. — *C. R. P. No.* 894 *of* 1923.

Limitation Act, Arts. 161 *and* 181—*Connected suits—One original and the other small cause suit—Joint trial—Decree in original suit reversed in appeal—Effect on small cause decree—Remedy—Limitation.*

On the file of a District Munsiff there were two connected suits, the plaintiff in one being the defendant in the other and *vice versa.* One of the suits was an original suit and the other a small cause suit. The suits were tried together, and both suits were decided in favour of one of the parties. The other

party filed an appeal against the decree in the original suit and being successful therein applied for a review of the decree in the small cause suit. *Held*, the remedy of the party was not by way of review, but by way of application to get a decree in his favour in the small cause suit also, and such application would fall under Art. 181, Limitation Act, and not under Art. 161.

V. P. Karunakaran Nambiar for Petitioner.

Respondent unrepresented.

T. S. V.

Devadoss and Waller, JJ. 15*th October*, 1925. — *C. R. P. No.* 679 *of* 1923.

Civil Procedure Code, O. 9, *R.* 13—*Applicability*—Ex parte *order directing delivery of property in execution—If can be set aside.*

Where in pursuance of a Court auction sale held in execution of a decree, an *ex parte* order was passed directing delivery of the property, the Court has no jurisdiction to set aside the *ex parte* order under O. 9, R. 13. Proceedings under O. 21, Rr. 97 to 101 are execution proceedings and the provisions of O. 9, Civil Procedure Code, are inapplicable to them. Case-law and the conflict therein discussed.

C. S. Venkatachari for Petitioner.

L. S. Veeraraghava Aiyar for Respondent.

T. S. V.

The Chief Justice, Krishnan and Beasley, JJ. 19*th October*, 1925. — *O. P. No.* 212 *of* 1924.

Indian Majority Act, S. 3—*Guardian appointed on condition of giving security—Failure to give security—Age of majority if extended—Suspensory orders—Practice—Madras Civil Rules of Practice, Rr.* 240 *to* 242—*If* ultra vires.

On an application for the appointment of a guardian, the Court passed an order in these terms : "Upon furnishing security for the amount of Rs.— X is appointed guardian of the minor." X did not furnish security within the time fixed, and subsequently another application was put in for the appointment of a guardian. The minor had then attained the age of 18 years and the question was whether the prior order had the effect of extending the period of minority up to the age of 21. *Held*, a suspensory order of appointment, taking effect only on the giving of security is unwarranted by law, being contrary to S. 34 of the Guardians and Wards Act, and the order being wholly

bad, the person attained majority on attaining the age of 18. 40 Mad. 775 dissented from; view of *Sadasiva Aiyar, J.* in 30 M. L. J. 508 followed; 4 C. L. J. 112 referred to.

Rules 240 to 242 of the Madras Civil Rules of Practice are *ultra vires* and the practice of passing suspensory orders should be discontinued. Procedure to be followed laid down.

V. Radhakrishnayya for Petitioner.

T. S. V.

Devadoss and Waller, JJ.
20th October, 1925. — *Cr. R. C. No.* 175 *of* 1925.

Penal Code, Ss. 467, 471—*Title to land—Using as genuine a forged document—Fraud—Meaning of—Detriment if necessary.*

Where a person uses as genuine a forged document to support his title to a disputed piece of land, he commits an offence under Ss. 467 and 471, Indian Penal Code, even though he might succeed in his claim to that property under a different title, *e.g.*, adverse possession. 9 Cal. 53; 83 I. C. 584 folld.; (1915) M. W. N. 278 dissented from.

The scope and meaning of the terms "fraudulently" and "dishonestly" in S. 464 discussed. The term "fraud" does not mean deceit followed by some detriment and it is not necessary that there should be a deprivation of property or some detriment. 13 Bom. 515; 21 All. 113; 28 Mad. 90; 41 Mad. 589 referred to.

F. S. Vaz for Petitioner.

The Public Prosecutor and *K. V. Srinivasa Aiyar* for Respondents.

T. S. V.

Jackson, J.
20th October, 1925. — *C. R. P. No.* 800 *of* 1923.

Provincial Small Cause Courts Act, S. 23—*Plaint returned under—Decree—Nature of—Appeal.*

Where a plaint filed in a Small Cause Court is returned under S. 23 in order to be presented to a Court having jurisdiction to determine questions of title to immoveable property involved therein, the decree passed in the suit is not a small cause decree and is appealable. 33 Mad. 323 (F. B.) distd.; 45 I. C. 645; 10 M. L. J. 313 folld.

Watrap S. Subramania Aiyar for Petitioner.

T. M. Krishnaswami Aiyar for Respondent.

T. S. V.

The Chief Justice, Krishnan and Beasley, JJ.
20*th October*, 1925. } C. S. *No.* 720 *of* 1925.

Madras High Court Original Side Rules, Ch. VI-A—Applicability—Suit on promissory note against executor of promisor.

The summary procedure prescribed by Chapter VI-A of the Original Side Rules applies to a suit by the payee of a promissory note against the executor of the deceased promisor, and such a suit can be filed only in the manner prescribed thereunder.

N. Chandrasekhara Aiyar for Plaintiff.

K. S. Narayana Aiyangar (*amicus curiae*) for Defendant.

T. S. V

Devadoss and Waller, JJ.
20*th October*, 1925. } *L. P. A. No.* 27 *of* 1924.

Evidence Act, S. 112—***Legitimacy—Presumption of—Conception during continuance of prior marriage—Birth after divorce and re-marriage—Hindu Law—Maravars—Applicability.***

A child born to a *Maravar* woman was conceived at a time when she was the wife of X. She was subsequently divorced and within a few months of her marriage to Y the child was born. *Held*, in the absence of proof that Y had no access to the mother at the time the child could have been begotten, the presumption under S. 112, Evidence Act, applies and the child must be treated as the legitimate child of Y. English Law on the subject considered. The Hindu Law as laid down in *Manu* and the ancient texts is not applicable in its entirety to *Maravars*. 47 Mad. 706 : 47 M. L. J. 155 affirmed.

L. A. Govindaraghava Aiyar and *P. S. Narayanaswami Aiyar* for Appellant.

K. V. Krishnaswami Aiyar for Respondent.

T. S. V.

The Chief Justice.
21*st October*, 1925. } *Cr. Appeal No.* 318 *of* 1925.

The Criminal Tribes Act, S. 23—Construction—Computation of conviction—Date of registration as member of criminal tribe—If crucial test.

On a reference under S. 429, Cr. P. Code, arising out of a difference of opinion between their Lordships *Devadoss* and

N R C

Waller, JJ. as to the construction of S. 23, Criminal Tribes Act, regarding the computation of the number of prior convictions of an accused person registered under the Act, *held*, by the *Chief Justice* (agreeing with *Waller, J.*) all convictions prior to 1st March, 1911, should be counted as one and convictions subsequent thereto counted as separate convictions irrespective of whether at the time of the conviction the accused had been registered as a member of a criminal tribe.

Per Devadoss, J.—The proper mode of construction is to count all convictions prior to registration as one conviction and subsequent convictions as separate.

P. K. Chari (amicus curiae) for Accused.

The Public Prosecutor for the Crown.

T. S. V.

The Chief Justice and Viswanatha Sastri, J. *22nd October,* 1925. — *A. S. No.* 436 *of* 1922.

Hindu Law—Debts—Commercial debt contracted by father—If binding on son—Text of Gautama—Obsolete.

The text of *Gautama* which includes a commercial debt in the category of *avyavyaharika* debts has become obsolete, and a Hindu son is liable for such a debt contracted by his father.

A. Satyanarayana for Appellants.

G. Lakshmanna and *V. Viyanna* for Respondent.

T. S. V.

Devadoss, J. *23rd October,* 1925. — *S. A. No.* 705 *of* 1923.

Malabar Law—Moplahs of South Malabar—Law governing—Alienee from person describing herself as Karnavathi of a Moplah tarwad—Suit for redemption and partition—Title—Proof of—Allegation and proof of custom.

The equity of redemption in a share of a house was sold by its owner to a *Moplah* lady X of South Malabar described in the sale deed as the *Karnavathi* and manager of a certain *tarwad*. After the death of X, Y describing herself as the then *Karnavathi* and manager of the *tarwad* sold the equity of redemption to the plaintiff who sued for redemption and partition. Y was not an heir of X under the Mahomedan Law. The plaint contained an account of these transfers and mentioned the recitals in the sale deeds referring to the *Karnavathis* of the *tarwad* but did not contain any allegation that the *tarwad* followed *Marumakkatayam*

Law. Nor was there any proof of such a custom in variation of the Mahomedan Law. *Held,* as the plaintiff's right to redeem depended on a transfer to him by a person who was competent to sell, he could not succeed in the absence of a specific allegation followed by proof that the *tarwad* was following *Marumakkatayam* Law and not the *Mahomedan* Law which would ordinarily apply.

B. Pocker for Appellant.

T. S. Viswanatha Aiyar for Respondent.

T. S. V.

The Chief Justice, Krishnan and Beasley, JJ.
27th October, 1925.

S. R. No. 5433 *of* 1925.

Civil Procedure Code, O. 41, R. 22—Original Side appeal—Memorandum of cross-objections—If lies.

The provisions of O. 41, R. 22 apply to appeals from the Original Side of the High Court and a memorandum of cross-objections can be filed in such an appeal. 48 I. A. 76 applied; 48 M. L. J. 384 overruled.

V. Radhakrishniah and *K. S. Narayana Aiyangar* for Petitioner.

T. S. V.

The Chief Justice, Krishnan and Beasley, JJ.
27th October, 1925.

C. C. C. Appeal No. 67 *of* 1922.

Easements Act, S. 15—Property claimed as owner—Easement right if can be decreed—Animus.

Where the claim of a person to a plot of land is dismissed, it is still open to him to claim an easement over the same, provided he proves that for the period fixed in S. 15 of the Easements Act he has been in enjoyment of the easement right as such. The question of *animus* is one of fact.

The principles laid down in English cases as to the acquisition of such easement apply to India, and some of the observations in 38 Mad. 1 being in conflict with (1915) A. C. 599, (1914) 3 K. B. 911 and 17 Ch. D. 535 cannot be supported.

S. Doraiswami Aiyar and *A. Raghunatha Rao* for Appellant.

P. Satyanarayana for Respondents.

T. S. V.

The Chief Justice, Krishnan and Beasley, JJ. *28th October*, 1925. } *L. P. A. No.* 35 *of* 1924.

Limitation Act, Arts. 62, 115 *and* 120—*Company—Shareholder—Suit for dividends—Period of limitation.*

A suit by a shareholder for the amount of dividend due to him is governed neither by Art. 62 nor Art. 115, but by Art. 120 of the Limitation Act.

The term "registered" in Art. 116 has reference only to the Registration Act and does not refer to registration under the Companies Act. 42 Mad. 33 overruled.

K. N. Rajagopala Sastri for Appellant.

P. Satyanarayana Rao for Respondent.

T. S. V

Devadoss and Waller, JJ. *28th October*, 1925. } *C. R. P. No.* 262 *of* 1924.

Estates Land Act, Ss. 171, 172—*Decision of the Board of Revenue—High Court—Jurisdiction to interfere in revision—Enhancement of rent—Proceedings under Ch. XI.*

The High Court has jurisdiction to interfere in revision with orders passed by the Board of Revenue under Ss. 171 and 172 of the Estates Land Act, the proceedings of the Board being judicial proceedings. Case-law discussed.

In settling a fair rent under Ch. XI of the Estates Land Act the power of the revenue authorities is not confined to or restricted by the provisions of Ch. III of the Act and hence in a proper case rent can be enhanced by more than 2 annas in the rupee.

Where the order passed by the Board of Revenue was based on a wrong assumption of the law, and the party aggrieved had no remedy by suit or otherwise, the High Court will exercise its powers of revision and superintendence.

V. Ramadoss and *K. Ramamurthi* for Petitioner.

The Government Pleader, A. Venkatrayaliah and *L. Venkatanarasiah* for Respondents.

T. S. V

Devadoss and Waller, JJ. *28th October*, 1925, } *L. P. A. No.* 158 *of* 1924.

Limitation Act, Arts. 134 *and* 144—*Religious trust—Sale by trustee—Successor suing for possession—Limitation.*

A suit by the trustee of a temple to recover possession of temple properties improperly sold by his predecessor is not governed by Art. 134, Limitation Act. Where the suit is instituted within two years of his becoming a *pujari* trustee, it is within time, though the sale took place more than 12 years previously. Case-law discussed. 48 M. L. J. 114 affirmed.

T. R. Ramachandra Aiyar and *N. P. Narasimha Aiyar* for Appellant.

T. M. Krishnaswami Aiyar and *P. R. Ramakrishna Aiyar* for Respondent.

T. S. V

Spencer and Odgers, JJ.
28th October, 1925. } *S. A. No.* 751 *of* 1924.

Limitation Act, Art. 11-*A.—Purchaser of share of joint family property—Delivery proceedings—Adverse order under O.*21, *R.* 101 *—Suit challenging—Failure in—Subsequent suit for partition and possession of share—If barred.*

The purchaser of a share of joint family properties in Madras being obstructed in getting delivery and failing in the delivery proceedings under O. 21, Rr. 95, etc., filed a suit under O. 21, R. 103 to challenge the order passed against him under R. 101. The suit was dismissed on the ground he was not entitled to joint possession. More than one year after the order under O. 21, R. 101 he filed another suit for partition and possession of his share. *Held*, (1) the suit was not barred under Art. 11-A of the Limitation Act; (2) there was no bar either under S. 11 or under O. 2, R. 2; and (3) the scope of the suit was quite different from that in the prior litigation. 19 A. L. J. 53; 24 C. W. N. 1031 (P. C.); 7 N. W. P. 113; 26 Bom. 146 distd.

Under the Mitakshara Law prevalent in Madras, such a purchaser has no right to joint possession, but must work out his rights by suing for partition.

P. R. Srinivasan for Appellant.

C. A. Seshagiri Sastri for Respondent.

T. S. V

Spencer and Odgers, JJ.
28th October, 1925. } *S. A. No.* 572 *of* 1923.

Contract—Breach—Suit for damages—Repudiation by defendant—If can afterwards object to breach by plaintiff.

The rule of law laid down in *Braithwaite* v. *Foreign Hardwood Co.*, (1905) 2 K.B. 543 that the repudiation of a contract by a vendee defendant absolves the vendor from performance of the conditions which he would otherwise have to allege and prove before suing to enforce the contract or for damages for breach thereof, is still good law in England. (1923) A. C. 48 ; 127 L. T. 267 ; 49 M. L. J. 1 ; 20 L. W. 725 referred to.

K. B. Venkatachela Aiyar (for *C. V. Anantakrishna Aiyar*) and *C. V. Harihara Aiyar* for Appellant.

M. Patanjali Sastri (for *A. Krishnaswami Aiyar*) for Respondent.

T. S. V

The Chief Justice, Krishnan and Beasley, JJ. *29th October*, 1925. — *C. M. A. No.* 346 *of* 1922.

Civil Procedure Code, S. 2 (2), *O.* 22, *Rr.* 3 *and* 4—*Application to be impleaded as legal representative—Sole claimant—Order dismissing application—If appealable.*

Where a person applies under O. 22, R. 3 to be brought on record as the legal representative of a deceased plaintiff and the same is dismissed at the instance of the defendant, though there is no rival claimant, the order of dismissal is not appealable. It is not an appealable order under O. 43, nor does it amount to a decree.

V. C. Veeraraghava Aiyangar (for *K. Bhashyam Aiyangar*) for Appellant.

S. Nagaraja Aiyar for Respondent.

T. S. V

The Chief Justice, Krishnan and Beasley, JJ. *29th October*, 1925. — *Ref. Case No.* 3 *of* 1925.

Income Tax Act (*XI of* 1922), *S.* 2—*Professional tax paid—If an item of deduction—Taxable income.*

Professional tax paid under S. 3 of the Madras City Municipal Act cannot be allowed as a deduction in computing the taxable income of an assessee. Nature of professional tax considered.

M. Patanjali Sastri for the Commissioner of Income-tax.

R. N. Aingar for the Assessee.

T. S. V

The Chief Justice and Viswanatha Sastri, J. }
30th October, 1925. } *A. S. No.* 202 *of* 1923.

Contract—Sale of goods—Advance paid—Breach—Suit for refund of advance paid—Interest—Power of Court to award.

On account of the conflict of judicial opinion in India, their Lordships referred to a Full Bench the question whether in a suit by a vendee for refund of the advance which he had paid under a contract for sale of goods, after the contract had fallen through, the Court had power to award interest on such advance amount.

A. Krishnaswami Aiyar and *N. Chandrasekhara Aiyar* for Appellants.

S. Varadachariar and *K. V. Sesha Aiyangar* for Respondents.

T. S. V

Phillips and Odgers, JJ. }
30th October, 1925. } *A. S. No.* 226 *of* 1924.

Transfer of Property Act, S. 84—*Mortgagor depositing money in Court—Refusal of mortgagee to draw out—Money subsequently taken out by mortgagor—Interest—If ceases to run.*

Their Lordships referred to a Full Bench the question whether in a case where the mortgagor deposits in Court the money due to the mortgagee and after the latter refuses to accept the amount, the same is drawn out by the mortgagor, his liability to pay interest ceases.

K. S. Krishnaswami Aiyangar for Appellants.

N. S. Srinivasa Aiyar and *S. V. Narayana Aiyar* for Respondents.

T. S. V.

Odgers and Madhavan Nair, JJ. }
2nd November, 1925. } *S. A. No.* 787 *of* 1923.

Malabar and Aliyasantana Law—Junior member—Marriage expenses—If binding on family—Maintenance—Generic term.

The marriage expenses of the junior member of an *Aliyasantana* or *Marumakkatayam Tarwad* are to be met by the family, provided there are adequate funds and they can afford the same. The maintenance right which every junior member has is very comprehensive in its scope, including not

only food, but education, medical expenses, etc., and there is no real ground to exclude marriage expenses. The nature and constitution of *tarwads* and the rights of members discussed with elaborate reference to case-law.

B. Sitarama Rao for Appellant.

K. Y. Adiga for Respondent.

T. S. V

The Chief Justice.
2nd November, 1925. } *C. R. P. No.* 426 *of* 1924.

Madras Estates Land Act, S.* 186*—Purpose of acquisition—Certificate of Collector—Conclusive nature of—Good of the estate—What is.

Under S. 186 of the Madras Estates Land Act it is for the Collector to decide whether the purpose for which the land-holder wishes to acquire land is reasonable and sufficient. The certificate of the Collector is conclusive on the question and the Civil Court cannot go behind it. It is for the Civil Court to judge of the relation of the purpose to the good of the holding or of the estate. "Good of the estate" does not mean the good of the whole estate, but the more equitable distribution of irrigation facilities among some of the ryots of the estate may be for the good of the estate.

P. Somasundaram for Petitioner.

K. N. Rajagopala Sastri for Respondent.

T. S. V

Spencer, J.
2nd November, 1925. } *S. A. No.* 480 *of* 1923.

Transfer of Property Act, S.* 53*—Settlement by a husband in favour of his wife and children—No creditors then—Subsequent creditor if entitled to question the same as fraudulent—Presumption.

Although a subsequent creditor may in certain circumstances be entitled to impeach an alienation made before his debt came into existence, there is no presumption under S. 53, Transfer of Property Act, that an alienation or settlement was in fraud of creditors because it has the effect of defeating the claims of subsequent creditors. 33 M. 205; 38 M. 1071 referred to.

K. P. Ramakrishna Aiyar for Appellant.

P. G. Krishna Aiyar for Respondent.

T. S. V.

The Chief Justice.
4th November, 1925. } *C. R. P. No.* 149 *of* 1925.

Civil Procedure Code, O. 33, *R.* 5 *(e)—Mortgage executed by applicant—Loan for the purposes of suit—Effect of.*

An application for leave to appeal *in forma pauperis* must be rejected if it is proved that any other person has obtained an interest in the subject-matter of the appeal by virtue of a mortgage deed executed by the applicant. O. 33, R. 5 (*e*) will apply even if the money is borrowed for the purposes of the suit and not the appeal.

T. L. Venkatrama Aiyar for Appellant.

P. V. Krishnaswami Aiyar for Respondent.

T. S. V

Jackson, J.
4th November, 1925. } *C. R. P. No.* 198 *of* 1924.

Civil Procedure Code, Ss. 7, 95—*Small Cause Court—Power to award compensation—Arrest before judgment.*

A Small Cause Court has got jurisdiction to award compensation for an improper arrest before judgment.

S. T. Srinivasagopalachari for Petitioner.

A. C. Sampath Aiyangar for Respondent.

T. S. V.

Spencer, J.
4th November, 1925. } *S. A. No.* 71 *of* 1923.

Temple—Trustee executing bond—Binding purpose—Decree against properties—If can be given.

One of three trustees of a temple executed a bond in favour of the plaintiff. The money was borrowed for purposes binding on the temple but no charge was created over temple property or a promise given to pay it out of temple funds. In a suit on the bond, *held*, (1) no decree could be passed against the temple properties. 32 M. L. J. 259 ; 13 L. W. 323 followed ; 43 Mad. 795 and 45 Mad. 703 distinguished ; and (2) the bond having been executed by one only of the three trustees was not binding on the trust. 27 Mad. 92 ; 42 M. L. J. 113 ; 5 C. L. J. 337 followed.

K. V. Krishnaswami Aiyar and *N. Swaminatha Aiyar* for Appellants.

N R C

S. Muthiah Mudaliar and *K. Narasimha Aiyangar* for Respondents.

T. S. V.

Wallace and Madhavan Nair, JJ.
5th November, 1925.

C. M. A. No. 269 *of* 1925.

Guardians and Wards Act, Ss. 34, 45—*Moneys of minor given on promissory notes—Order of Court to realise—Failure to obey by guardian—Penalty for contumacy.*

Moneys of a ward of Court were outstanding on promissory notes and the Court passed an order directing the guardian to realise such moneys. He failed to do so, whereupon the Court imposed on him penalty for contumacy under S. 45 (1) (*b*), holding that he had failed to carry out the obligation cast on him by S. 34 (*c*) and (*d*). *Held,* S. 34 (*c*) and (*d*) would not apply, and it is only as regards cash in his hands that he can be asked to pay into Court. The order under S. 45 (1) (*b*) was therefore improper. 25 C. L. J. 149 ; 20 C. W. N. 663 ; 46 All. 458 referred to.

K. Rajah Aiyar for Appellant.

T. M. Ramaswami Aiyangar for Respondent.

T. S. V

Wallace and Madhavan Nair, JJ.
6th November, 1925.

L. P. A. No. 143 *of* 1924.

Madras Estates Land Act, S. 3 (2) (*c*)—*Jagir—What is—Reference to by Inam Commissioner—" Unsettled "—If refers to jagir.*

In a suit by the plaintiffs for a declaration that they were entitled to occupancy rights in certain villages, it was proved that the villages when originally granted to the ancestors of the defendant were called " jagir " and the same nomenclature was adopted by the Inam Commissioner in subsequent proceedings. *Held,* though the mere fact of a village being called a *jagir* did not constitute it an estate within the meaning of S. 3 (2) (*c*) of the Estates Land Act, yet the grant coupled with the subsequent proceedings of the Inam Commissioner showed it was a *jagir* within the meaning of S. 3 (2) (*c*) and hence the tenants when the Act came into force had occupancy rights conferred on them.

Nature and incidents of a *jagir* adverted to ; Baden-Powell's Land Systems in British India, Vol. I, pp. 189,257; 46 Cal. 683 ; 40 Mad. 664 referred to.

The term *jagir* in S. 3 (2) (*c*) is not limited to *jagirs* granted before the advent of the East India Company ; and the adjective " unsettled " qualifies *jagir* as well as *palayam.*

Semble : The settlement referred to in the clause includes not only the Permanent Settlement but also one under the Inam rules. 15 M. L. T. 277 referred to.

A. C. Sampath Aiyangar for Appellant.

T. R. Ramachandra Aiyar for Respondent.

T. S. V.

The Chief Justice, Krishnan and Beasley, JJ
10th November, 1925.

S. A. No. 1076 *of* 1922.

Natural rights—Upper and lower lands—Surface water—Flow of—Right to prevent water flowing on to lower land.

In the case of adjacent agricultural lands in a village belonging to two different owners, and one of which is higher than the other, the owner of the lower land has no right to prevent surface water falling on the upper land from flowing naturally on to the lower land by raising bunds or otherwise. 113 L. T. 55 ; (1893) 1 Ch. 691 ; 137 E. R. 205 ; 49 M. L. J. 282 followed. 29 Mad. 539 ; (1910) M. W. N. 545 overruled.

V. Suryanarayana for Appellant.

B. Satyanarayana for Respondent.

T. S. V

The Chief Justice.
10th November, 1925.

S. A. No. 481 *of* 1923.

Limitation Act, Art. 177—*Period of limitation under—Effect of Act XXVI of* 1920.

His Lordship referred to a Full Bench the question whether the period of limitation under Art. 177 of the Limitation Act remained at six months even after the amending Act XXVI of 1920.

P. R. Srinivasan for Appellant.

S. Ramaswami Dikshit and *L. A. Gopalakrishna Aiyar* for Respondent.

Spencer and Venkatasubba Rao, JJ.
12th October, 1925.

A. S. No. 330 *of* 1923.

Civil Procedure Code, S. 34—Decree for unliquidated damages—Interest between date of suit and date of decree—Discretion of Court.

In the case of a claim for unliquidated damages, interest from the date of the plaint up to the date of decree is entirely a matter of discretion for the Court. Subordinate Courts should give reasons for the exercise of their discretion one way or the other, but the case of the High Court is different. 39 C. L. J. 77 followed ; 60 I. C. 288 dissented from.

C. V. Anantakrishna Aiyar and *C. V. Harihara Aiyar* for Appellant.

N. Rama Aiyar for *P. N. Marthandam Pillai* for Respondent.

T. S. V

Devadoss and Waller, JJ.
13th November, 1925.

C. M. A. No. 20 *of* 1923.

Civil Procedure Code, S. 92—Scheme framed—Liberty given to persons interested to apply in respect of matters arising out of scheme—Clause ultra vires—*Application by archaka for salary—If maintainable.*

Where the scheme framed by a Court with respect to a temple contained a general clause giving liberty to persons interested to apply to the Court in respect of any matter arising out of the scheme or any modification thereof, the provision is *ultra vires*. The *archakas* of a temple cannot apply to the Court under such a provision for the salary due to them. 49 M. L. J. 225 (P. C.) ; 20 L. W. 687 followed ; 28 Mad. 319; 24 Bom. 45 held to be bad law.

A. Satyanarayana for Appellant.

V. Suryanarayana for Respondent.

PRIVY COUNCIL.

CORAM : *Lord Shaw, Lord Phillimore,* and *Sir John Edge.*

29th October.—*Thakur Pyarsingh* v. *Sona Bahuji and others* (Central Provinces—Appeal No. 141 of 1924).

This appeal raised the question as to whether, on the 9th November, 1918, the 3rd respondent was adopted by Yeshwant Singh, deceased proprietor of the Mandhata estate, possession of which was claimed by the appellant, and refused him by the Court of the Judicial Commissioner.

L. de Gruyther, K. C. and *J. M. Parekh* for Appellant.

Sir G. Lowndes, K. C. and *M. R. Jardine* for Respondents.

Appeal dismissed.

29th October.—*Kumar Kalikanand Singh and others* v. *R. Prasad Singh and others* (Patna—Appeal No. 41 of 1924).

These two consolidated appeals arise out of two suits brought by the respondent in 1914 on two mortgages of ancestral property made in July, 1904, and November, 1912, respectively, by the managing members of the family, on which both Courts in India had decreed a sale. The appellants (sons of the mortgagors) contended that the mortgages were not beneficial to the family, nor made under circumstances rendering them binding thereon, and also that there was separation between the brothers (mortgagors) prior to July, 1904.

L. de Gruyther, K. C. and *W. Wallach* for Appellants.

Sir G. Lowndes, K. C. and *K. Brown* for Respondents.

Appeal dismissed.

CORAM : *Lord Shaw, Lord Phillimore, Sir John Edge* and *Mr. Ameer Ali.*

30th, 2nd and 3rd November.—*Jawahir Singh* v. *Udai Parkash and others* (Allahabad—Appeal No. 22 of 1924).

The respondents here claimed recovery of joint family property sold by their father in 1906 to Dalip Singh, from whom the appellants derived title, on the ground that the sale was not justified by family necessities or Hindu Law. The claim was opposed on the ground of limitation.

B. Dube for Appellant.

Judgment reserved.

N R C

30th, 2nd and 3rd November.—*Man Singh* v. *Nawlakhbati and another* (Patna—Appeal No. 94 of 1924).

In December, 1918, the two widows of Maharaja Harballav Singh (owner of the Sonbarsa estate, Bhagalpur, who was assassinated on the 1st April, 1907) executed a deed surrendering their joint life-interest in the estate, thus accelerating the vesting of the estate in the immediate reversioners. The appellant claims, by reason of the surrender, possession of half the estate from the junior widow (2nd respondent), and his claim is resisted on the ground that the deed is invalid (*i*) under S. 60 of the Bengal Court of Wards Act (IX of 1879); (*ii*) because made by *purdanashin* women, to whom it was not properly explained.

L. de Gruyther, K. C. and *S. Hyam* for Appellants.

Sir G. Lowndes, K. C. and *E. B. Raikes* for Respondents.

Judgment reserved.

CORAM : *Lord Dunedin, Lord Sumner* and *Sir John Edge.*

2nd November.—*V. M. Abdul Rahman* v. *King-Emperor* (Burma).

The petitioner was convicted on the 1st June, 1925, at Rangoon before H. S. Sitzle, District Magistrate, on two charges under Ss. 466—109 and Ss. 466—116, Penal Code, and sentenced to two years' rigorous imprisonment, which was reduced on appeal to 9 months. He now prayed for Special Leave to appeal because—

1. Between the hearing of the appeal and the judgment thereon, the Magistrate, at the request of the Judges of the High Court, furnished them with a report—uncommunicated to the petitioner or his legal advisers—upon certain questions of procedure arising at the trial, and forming one of the grounds of appeal. Such report was adverse to the petitioner's contentions, and though his Counsel had no opportunity of commenting on it, it was adopted and cited *seriatim* by the Judges of appeal in their judgment.

2. Prior to the report, the Magistrate had an interview with one of the Judges at which neither the petitioner nor his legal advisers were or were invited to be present.

3. The charges, trial and appeal were had in a manner which violated Ss. 191, 233 and 360-361, Criminal Procedure Code.

4. Inadmissible evidence was admitted, necessary expert evidence excluded, accomplices' evidence accepted without corroboration, and both Courts had misdirected themselves on the question of the petitioner's motive.

Sir John Simon, K. C., K. N. Chaudhuri and *D. Frampton* for Petitioner.

K. Brown for Respondent.

Leave granted.

A. de M.

HIGH COURT.

Jackson, J.
6th November, 1925. } *Cr. Rev. Case No.* 229 *of* 1925.

Criminal Procedure Code, S. 247—Acquittal—Complainant not present at adjourned hearing—Duty of Court.

In a summons case, the accused was acquitted under S. 247, Criminal Procedure Code, on the ground that the complainant did not appear when the case was called at 12 noon on the adjourned day fixed for examining witnesses. He, however, appeared later before the order of acquittal was signed and delivered. *Held* (1) the order of acquittal and the refusal to go on with the trial amounted to a refusal to exercise jurisdiction and was bad ; (2) S. 247 mentions only "day" and not "hour" and a Court is not bound to acquit if the complainant does not appear when called, but only later in the day 7 Mad. 356 distd. ; and (3) penal provisions should be construed liberally.

V. L. Ethiraj and *P. V. Krishnaswami Aiyar* for Petitioner.

The Public Prosecutor and *A. Srirangachari* for Respondents.

T. S. V.

Wallace and Madhavan Nair, JJ.
9th November, 1925. } *C. M. A. No.* 447 *of* 1924.

Civil Procedure Code, Ss. 47 *and O.* 21, *R.* 58*—Claim petition—Defendant against whom decree satisfied—Order— If appealable—*Locus standi *to plead bar of limitation.*

In execution proceedings, a defendant as against whom the decree had been satisfied filed a claim petition under O. 21, R. 58 alleging that the property attached was his and that execution was barred by limitation. The Court held that he had no *locus standi* to raise the plea of limitation. *Held,* the matter being one under S. 47, Civil Procedure Code, the order was appealable. 39 M. L. J. 603 ; 5 L. W. 701 ; 41 M. L. J. 54

referred to; also that the claimant was entitled to raise a plea of limitation.

K. G. Srinivasa Aiyar for Appellant.

M. S. Ratnasabapathi Mudaliar for Respondent.

T. S. V

Devadoss and Waller, JJ.
13th November, 1925. } *C. M. S. A. No.* 91 *of* 1924.

Civil Procedure Code, O. 21, *R.* 16—*Decree for the payment of money—Mortgage decree if a decree for money.*

A mortgage decree is not a decree for the payment of money within the meaning of the second proviso to O. 21, R. 16. It is only when a personal decree is passed in a mortgage suit that it becomes a decree for money within the meaning of that section. 43 M. L. J. 761 ; 28 Mad. 473 distd. ; 47 M. L. J. 434 ; 14 C. L. J. 639 folld.

A. V. Viswanatha Sastri for Appellant.

V. Ramaswami for *C. Padmanabha Aiyangar* for Respondent.

T. S. V

Devadoss and Waller, JJ.
13th November, 1925. } *L. P. A. No.* 74 *of* 1924.

Hindu Law—Will—Construction—Estate tail—Validity of.

The will of a Hindu adopted son made a devise of his properties to his natural father and his male heirs and then followed directions that the aforesaid natural father or heirs should maintain the adoptive mother during her life, perform the funeral obsequies of herself and himself and lastly that the aforesaid natural father and his heirs should take the family house with rights of gift, alienation and all other rights. *Held*, affirming the judgment of *Phillips, J.* that there was only one devise, that the words created an estate tail, that the devise was not to the natural father alone, but to him and his male heirs and being an estate unknown to Hindu Law was void. The effect was to give an estate for life alone to the natural father of the testator. Jarman on Wills, p. 580; 98 E. R. 1387 folld.

K. V. Krishnaswami Aiyar and *K. Rajah Aiyar* for Appellant.

T. M. Krishnaswami Aiyar and *T. M. Ramaswami Aiyar* for Respondent.

T. S. V

PRIVY COUNCIL.

Petitions for Special Leave to Appeal.

CORAM :—*Lord Dunedin, Lord Sumner* and *Sir John Edge.*

26th October.—(1) *Anandrao G. Phanse* v. *The King-Emperor.*

(2) *Shafi Ahmed Wali Ahmed and others* v. *The King-Emperor* (Bombay).

These two petitions from the prisoners convicted on the 23rd March last before Crump, J. and a Special Jury (of having, on the 12th January, engaged in an attack on A. K. Bawla, the paramour of Mumtaz Begum, in pursuance of a conspiracy to kidnap her from British India, and in the act murdered the said A. K. Bawla, and seriously wounded Mumtaz Begum, Lieut. Saegert, and K. E. Matthew) prayed for Special Leave to appeal on the ground that—(*i*) the great public prejudice engendered against them in Bombay by the Press prior to the trial, and the refusal by H. E. the Viceroy to remove the venue from Bombay, had prevented a fair trial ; (*ii*) the identification of the prisoners as the real culprits by the witnesses was unsatisfactory ; (*iii*) the weight of the evidence was against the verdict.

Sir J. Simon, K. C., Sir G. Lowndes, K. C., J. M. Parekh and *M. R. R. Pillai* for Petitioners.

A. M. Dunne, K. C. and *K. Brown* for Respondent.

Both dismissed ; reasons to be given later.

26th October.—*Indar Singh and another* v. *King-Emperor* (Lahore).

Petitioner 1 was sentenced to death, and Petitioner 2 (by reason of his youth) to transportation for life, for having, on the 9th October, 1923, murdered Thola Singh, and they now submitted that—(*i*) certain " confessions " given in evidence against them were inadmissible as having been made while in Police custody (S. 26, Evidence Act), and not recorded in strict accordance with Ss. 164 and 364, Criminal Procedure Code; (*ii*) their re-arrest and trial by order of the District Magistrate, Ferozepore, after their discharge by the First Class Magistrate, was an illegality.

W. Wallach for Petitioners.

K. Brown for Respondent.

Dismissed.

N R C

26th October.—*Pakhar Singh* v. *King-Emperor* (Lahore).

Petitioner, who was convicted on the 23rd March last of the murder of Khem Singh and his wife, Chand Kour, alleged as grounds of his application for Special Leave that—(*i*) the statements of bystanders were inadmissible in evidence; (*ii*) the statements and records made in the course of a Police investigation under S. 162, Criminal Procedure Code, were also inadmissible.

Sir G. Lowndes, K. C. and *J. M. Parekh* for Petitioner.

K. Brown for Respondent.

Dismissed.

CORAM: *Lord Dunedin, Lord Wrenbury* and *Sir John Edge.*

27th October.—*Wali Mohamed and others* v. *Mohd. Bakhsh and others* (Lahore).

The petitioners were sued in 1920 as assignees of a mortgage of 1880 for redemption of the mortgaged land, and pleaded in defence that, prior to the Settlement of 1891, the mortgagors had conveyed to them the equity of redemption, thus making them the absolute owners of the land, and mutation of title had been duly effected under the Punjab Land Revenue Act (XVII of 1887). Some of the records had been destroyed in the riots of 1919, but those remaining supported, in the opinion of the Sub-Judge, Sheikurpura, this defence, but the District Judge on appeal reversed his decision and decreed the suit, refusing a certificate of appeal to the Privy Council on the ground that "in effect, inferences drawn from entries in the Records of Rights and Settlement records were questions of fact, and could not be examined by the Court in second appeal". The defendants accordingly now applied for Special Leave to appeal.

L. de Gruyther, K. C. and *W. Wallach* for Petitioners.

Granted.

A. de. M.

HIGH COURT.

Wallace and Madhavan Nair, JJ. *13th November, 1923.*	*C. R. P. No. 771 of 1923.*

Madras Estates Land Act, Ss. 3 (2) (d) and 8, Exception—Inam—Surrender by ryot—If an "acquisition" within the meaning of the exception to S. 8—Lands surrendered if no longer an estate.

Their Lordships referred to a Full Bench the question whether in the case of an inam falling within S. 3 (2) (d) of the Madras Estates Land Act surrender by a ryot is acquisition within the meaning of the exception to S. 8 so as to take the lands in respect of which the surrender is made out of the category of an estate.

The effect of Ss. 3 (2) (d), 3 (7), 6 (2), 8 (4) and exception considered. 38 Mad. 608, 843, 891 ; 45 Mad. 47 referred to.

A. Krishnaswami Aiyar and *Ch. Raghava Rao* for Petitioners.

S. Varadachariar and *V. Govindarajachari* for Respondent.

T. S. V

Venkatasubba Rao and Madhavan Nair, JJ.
17th November, 1925.

C. M. P. No. 1015 *of* 1925.

Civil Procedure Code, Ss. 94, 136 *and O.* 39, *R.* 2 (3)—*Injunction order—Contempt of Court—Disobedience—Punishment—How to be carried out.*

The procedure by way of contempt under O. 39, R. 2 (3) applies to disobedience of all injunctions issued under S. 94, Civil Procedure Code, and is not confined merely to injunctions issued under O. 39, Rr. 1 and 2. 7 L. W. 328 ; 42 All. 8 followed.

In a case where an injunction order issued by a Judge of the High Court sitting on the Appellate Side was disobeyed by the respondent residing in the mofussil, as the execution chapter is not applicable, the warrants of arrest and attachment should be issued to the District Court asking it to proceed under S. 136, Civil Procedure Code.

Quaere : Whether S. 136 may not itself apply, as the High Court on its Appellate Side has jurisdiction over the whole Presidency ?

B. Sitarama Rao and *S. R. Muthuswami Iyer* for Petitioner.

T. M. Krishnaswami Aiyar for Respondents.

T. S. V.

Devadoss and Waller, JJ.
20th November, 1925.

L. P. A. No. 157 *of* 1924.

Civil Procedure Code, O. 21, *Rr.* 58, 63—*Money decree—Execution sale—Claim petition by mortgagee decree-holder—*

Dismissal of petition after directing claim to be notified—Effect of order—Suit for possession—Lis pendens

The plaintiffs brought to sale certain immoveable properties in execution of a money decree. The defendants who had by that time obtained a preliminary mortgage decree against the same put in a claim petition praying either that the claim might be allowed or the same intimated to the intending bidders. The Court passed an order " Claim will be notified. Petition dismissed." The properties were sold and purchased by the plaintiffs who obtained symbolical possession. Subsequently the defendants got their preliminary decree made absolute, and the properties were purchased by themselves and possession obtained. In a suit for possession by the defendants, *held,* (1) the order on the claim petition being one adverse to the defendants and not having been set aside within a year, their rights under the mortgage decree could not be availed of as against the plaintiffs. 41 Mad. 985 applied ; 41 M. L. J. 198 ; 44 M. L. J. 141 ; 43 M. L. J. 467 ; 86 I. C. 233 referred to ; and

(2) the plaintiffs' rights were not affected by *lis pendens* by reason of the final decree proceedings in the mortgage suit.

B. Sitarama Rao and *K. Srinivasa Rao* for Appellant.

B. Somayya for Respondent

T. S. V

Devadoss and Wallace, JJ. *24th November, 1925.* } *C. M. A. No.* 295 *of* 1923.

Madras Hereditary Village Offices Act (III of 1895), *S.* 21—*Jurisdiction—Civil Court—Service inam lands—Suit for possession—Claim not based as emoluments of office.*

A suit for possession of service *inam* lands based on an act of trespass or of a tenant holding over and not claiming the lands as the emoluments of an office is cognizable by a Civil Court, and is not barred by S. 21 of Madras Act III of 1895. 30 Mad. 126 ; 33 Mad. 208, 231 ; (1917) M. W. N. 7 ; 41 M. L. J. 372 referred to.

V. Ramadoss and *V. Krishna Mohan* for Appellant.

V. S. Narasimhachari for Respondent.

T. S. V.

PRIVY COUNCIL.

Petition for Special Leave to Appeal.

CORAM : *Lord Dunedin, Lord Wrenbury* and *Sir John Edge.*

27th October.—*Natha Singh* v. *Amir Shah.* (Lahore—Appeal No. 29 of 1925).

The appellant sued for specific performance of a contract by which the respondent on the 28th March, 1918, agreed to sell him a certain land ; and the appeal turned on the question whether that contract was, as contended by the respondent, and held by the High Court on appeal, superseded by another of the 16th April, 1918.

L. de Gruyther, K. C. and *W. Wallack* for Appellant.

Sir G. Lowndes, K. C. and *B. Dube* for Respondent.

Appeal dismissed.

Appeals.

CORAM : *Lord Shaw, Lord Phillimore, Sir John Edge, Mr. Ameer Ali* and *Lord Salvesen.*

5th and 6th Nov.—*Bahadur Singh* v. *Hukum Chand and others.* (Patna—Appeal No. 36 of 1924).

These are consolidated cross-appeals from members of the two rival sects of Jains—Digambara and Swetambara—relative to the right to worship in certain Tonks and temples, each sect claiming the right to the exclusion of the other, by virtue of dedication and custom. The question has also been raised by the respondents whether a declaration, claimed by the appellant, of such right, can be made under section 42, Specific Relief Act.

L. de Gruyther, K. C., Sir G. Lowndes, K. C. and *B. Dube* for Appellant.

A. M. Dunne, K. C. and *E B. Raikes* for Respondents.

Judgment reserved.

6th Nov.—*Chiranjit Singh* v. *Har Sarup.* (Allahabad—Appeal No. 80 of 1923).

Consolidated cross-appeals.

In July, 1914, the appellant agreed to buy the late Jyotish Sarup deceased's " Markham Grant Estate" for Rs. 476,000, and paid Rs. 165,000 to account. Subsequently, the sale fell through, and the appellant instituted the present suit in October, 1917, claiming the refund of the Rs. 165,000, which he

alleged was in part payment of the purchase money. The vendor, on the other hand, considered it forfeited on the ground of its being earnest money. The appellant's appeal on this point is being met by the cross-appeal of the respondent on the question of limitation.

A. M. Dunne, K. C. and *B. Dube* for Appellant.

L. de Gruyther, K. C. and *J. M. Parekh* for Respondent.

Judgment reserved.

9th, 10th and 12th Nov.—*Maharaja of Vizianagram* v. *Collector of Godavari.* (Madras—Appeal No. 55 of 1924).

The appellant here contests the right of the Government to levy, under Madras Act III of 1905, penal assessment on certain land which was submerged by the River Godavari, and subsequently reformed, and is claimed by him as an accretion to his lanka of Perugu, and also as a reformation *in situ* of the Pedda lanka, forming part of his village of Kotipalli. The Government contends that it is a reformation *in situ* of the Government village of Sanapalli.

W. H. Upjohn, K. C., K.V.L. Narasimham and *P. V. Subba Rao* for Appellant.

L. de Gruyther, K. C. and *K. Brown* for Respondent.

The hearing is proceeding.

A. de M.

HIGH COURT.

Devadoss and Wallace, JJ.
24th November, 1925. — *C. M. A. No.* 106 *of* 1925.

Civil Procedure Code, S. 145 *and O.* 21, *R.* 2—*Surety for judgment-debtor—Plea that decree had been satisfied for payment —No satisfaction recorded—Plea not open.*

A person who stands surety for a judgment-debtor is not a party to the decree, but is still competent to apply under O. 21, R. 2 for recording satisfaction of the decree. Where no satisfaction has been entered up under O. 21, R. 2 and such surety is proceeded against, he cannot set up the plea that the decree has been satisfied by payment. 67 I.C. 885 followed; 34 Mad. 659; 40 Mad. 296 distd.; 43 Mad. 325 referred to.

B. Somayya for Appellant.

T. V. Venkatarama Aiyar and *T. V. Ramanatha Aiyar* for Respondent.

T. S. V.

Waller and
Madhavan Nair, JJ.
25th November, 1925.

L. P. A. No. 61 of 1925.

Malabar Law—Maintenance—Karar—Alteration of—Allotment to tavazhies—Suit by some junior members alone—Maintainability—Proper frame of suit—Amendment—Second Appeal.

In a Malabar *tarwad* consisting of a large number of members, *karars* were entered into in 1886, by which properties were allotted to the several *tavazhies* for maintenance. There was an express recital that the arrangement was to remain in force only during the lifetime of the then *Karnavan.* Even after his death the same arrangements continued and more than thirty years later, some junior members of one of the *tavazhies* sued the *Karnavan* of the *tarwad* for maintenance. *Held,* (1) though the *karar* of 1886 ceased to have legal effect on the death of the then *Karnavan* it was open to the succeeding *Karnavans* to keep the same arrangements in force or alter them according to the circumstances, but if they were so kept in force, a *Karnavan* could set aside existing arrangements in favour of one branch only after substituting other suitable arrangements. 18 I. C. 234 referred to.; (2) in such a suit for maintenance, the *thavazhi Karnavans* were all necessary parties and the entire *tarwad* should be properly represented, for it is only then that the *Karnavan* can make the necessary changes in the maintenance allotments in view of the change in circumstances. In a proper case the plaint can be allowed to be amended even in second appeal impleading all the necessary parties.

K. P. M. Menon and *B. Pocker* for Appellants.

T. S. Viswanatha Aiyar and *V. P. Karunakaran Nambiar* for Respondents.

T. S. V.

Waller and
Madhavan Nair, JJ.
25th November, 1925.

C. M. A. No. 207 of 1923.

Civil Procedure Code, S. 47—Execution of decree—Disputes between rival decree-holders—Order if appealable.

Where in proceedings relating to the execution of a decree, disputes arise between persons who occupy the position of rival decree-holders, but in which the judgment-debtor is not interested, an order passed by the executing Court relating to

such matters does not fall under S. 47, Civil Procedure Code and is not appealable.

T. V. Venkatarama Aiyar and *T. V. Ramanatha Aiyar* for Appellant.

K. Ramanath Shenai and *K. S. Desikan* for Respondent.

T. S. V.

Ramesam, J.
1st December, 1925. } *S. A. No.* 198 *of* 1925.

Auction purchaser—Title of—Decree obtained against alleged legal representatives of debtor—Decree not obtained against assets in their hands—Sale in execution and purchase by stranger—Third party establishing title as true heir-at-law of debtor—Suit to recover possession from auction purchaser—Rights of parties.

Certain creditors of one *K* sued two sisters of his and a sister's son after the death of *K* and after the death of his son *L* who survived him, on foot of a promissory note executed in their favour by *K* and obtained a decree. Subsequently certain agnatic relations of *K* and *L* filed a suit against *K's* sister's son and certain other persons and succeeded in establishing their right as heirs-at-law to *L's* estate. The creditor's decree was executed and some lands belonging to *L's* estate were sold in Court auction. In a suit filed by the agnatic relations of *L* against the Court auction purchasers, *held*, (1) that the agnatic relations could recover possession; (2) that the decree obtained by the creditors against the sisters and sister's son of *K* is not binding on the rightful heirs, inasmuch as *K's* sisters and sister's son were impleaded merely as heirs and not as being in possession of any assets belonging to *L's* estate; and (3) that the doctrine of a decree *bona fide* obtained against wrong representatives being binding as against the right representatives of the estate cannot be extended to cases when the wrong representatives were not in possession of any assets belonging to the estate. 11 Mad. 408 and 36 M. L. J. 106 relied on. 29 M.L.J. 698 explained. 33 Mad. 6 distinguished. Case-law reviewed.

V. Govindarajachari for *A. Krishnaswami Aiyar* for Appellants.

V. S. Narasimhachar for Respondent.

T. S. V.

PRIVY COUNCIL.

12th, 13th and 23rd November.—*Maharaja of Vizianagram* v. *Secretary of State.*

Hearing continued and concluded; judgment reserved.

CORAM: *Lord Dunedin, Lord Shaw, Lord Sumner, Sir John Edge* and *Lord Salvesen.*

17th, 19th and 20th November.—*Maneckji P. Barucha and another* v. *Wadilal Sarabai & Co. and Ghia* (Bombay—Appeal No. 125 of 1924).

The appellants, who are share-brokers in Bombay, sued the respondents, also share-brokers, for the return of the scrip and blank transfers relative to 104 shares in Alcock, Ashdown & Co., which they alleged the latter obtained by a fraudulent trick in April, 1920, from an intermediate dealer, Ghora, whose cheque for Rs. 154,800, price of the same, was dishonoured by the Bank. The respondents contended that the appellants had no equity enforceable against them, and that the documents mentioned were not "goods" within the meaning of sections 76, 78 and 121 of the Contract Act (IX of 1872). The Trial Judge, Kajiji, J., had decreed the suit, but his judgment was reversed on appeal by Macleod, C. J. and Crump, J.

A. C. Clauson, K.C., E. B. Raikes and *Johnston* for Appellants.

Sir J. Simon, K.C., Sir G. Lowndes, K.C., and *B. Dube* for Respondents.

Judgment reserved.

CORAM: *Lord Dunedin, Lord Sumner, Sir John Edge* and *Lord Salvesen.*

20th November.—*Maung Kan* v. *King-Emperor* (Rangoon).

The petitioner was convicted and sentenced to death on the 11th May last by the Sessions Judge, Rangoon (whose judgment was affirmed on appeal) for the murder of Maung Myat Sein on the evening of the 5th February in the course of an "ahlu" (charity show) in Pyndwingon village. He contended that, as the deceased died in the course of a free fight which

he had with him, his offence was at most that of culpable homicide not amounting to murder, and he now prayed for special leave to appeal, alleging that "grave and substantial injustice" had been caused to him at the trial by—

(*a*) the witnesses selected for the prosecution, *e.g.*, the deceased's father, being persons naturally biassed against him ;

(*b*) the Sessions Judge neither referring to, nor admitting in evidence, the deposition of the deceased's father recorded before the committing Magistrate, which was contradictory of his evidence at the trial ;

(*c*) neither the Magistrate nor the Sessions Judge questioning him, the petitioner, as required by S. 342, Criminal Procedure Code, so as to enable him to explain the circumstances appearing in evidence against him ;

(*d*) the High Court on appeal treating as immaterial the deceased's father's evidence being coloured by his knowledge of the medical evidence as to the deceased's injuries.

G. Saunders for Petitioner.

K. Brown for Respondent.

Dismissed.

CORAM : *Lord Dunedin, Lord Shaw, Lord Sumner, Sir John Edge* and *Lord Salvesen.*

24th November.—*Chandar S. Baksh Singh and another* v. *Mst. Raj Kunwar* (Allahabad—Appeal No. 88 of 1923).

The respondent claimed from her brother and the widow of her deceased brother (appellants) possession of certain mahals in 8 villages in the Fatehpur district, Agra ; and her suit, dismissed by the Subordinate Judge, Cawnpore, was decreed by the High Court on appeal. She alleged that Appellant 1 had been adopted by her uncle, and the Appellant 2's husband (her deceased brother) having died in the lifetime of her father, she was entitled to succeed to her father's estate by survivorship. In defence the adoption of Appellant 1 was denied, and it was pleaded that, even if he had been adopted by his uncle, as all the parties were members of a joint Hindu family, he was entitled to take the estate by survivorship ; further, that the respondent's father belonged to the caste of the Bais Thakurs of Oudh, amongst whom, and more particularly in the family

custom excluded daughters from inheriting their father's estate.

L. de Gruyther, K.C. and *W. Wallach* for Appellants.

Sir G. Lowndes, K.C. and *B. Dube* for Respondents.

The hearing is proceeding.

A. de M.

HIGH COURT.

Ramesam, J. } *S. A. No.* 814 *of* 1923.
17th November, 1925.

Hindu Law—Widow—Gift by—Remote reversioner attesting and consenting not to dispute its validity—Suit to declare its invalidity—Estoppel—Immediate reversioner getting possession after declaring gift invalid—Effect of.

A remote reversioner who attested a gift by a Hindu widow to her brother and passed a letter of consent not to dispute the validity of the gift, the immediate reversioner being the mother of the last male holder, is precluded from suing for a declaration of its invalidity and no decree can be passed in his favour merely because prior to such decree the widow happened to die and the immediate reversioner, the mother of the last male holder sued for and obtained possession of the properties on the ground of the gift being invalid and in no way binding on the reversioner. 42 Mad. 523 (P. C.) applied and 45 All. 339 (F. B.) followed.

Ch. Raghava Rao for Appellant.

Dr. S. Swaminadhan for Respondent.

T. S. V.

Waller and Madhavan Nair, JJ. } *C. M. A. No.* 318 *of* 1923.
18th November, 1925.

Provincial Insolvency Act (*V of* 1920), *S.* 75*—Person aggrieved—Alienee from insolvent—If entitled to appeal against order of adjudication.*

An alienee from the insolvent whose alienation is the alleged act of insolvency is not a necessary party to a creditor's petition to have the debtor adjudged an insolvent; and against an order adjudging the debtor an insolvent, the alienee is not

entitled to appeal as a person aggrieved within S. 75 of the Provincial Insolvency Act.

V. S. Narasimhachariar for Appellants.

Ch. Raghava Rao for Respondent.

T. S. V.

Devadoss and Waller, JJ. *20th November*, 1925. — *L. P. A. No.* 100 *of* 1924.

Malabar Law—Moplahs—Custom—Gift by a Moplah to his mother and children constituting them as tarwad—Validity of.

A Moplah of Calicut following Muhammadan Law made a gift of certain property in favour of his mother to be enjoyed as *tarwad* property by herself and her children present and future, and to perform certain ceremonies out of the income without power of alienation or partition and to be managed by the seniormost male member for the time being. The children of the donor filed a suit for a declaration that the gift was not valid and binding on them.

Held, upholding the view of *Krishnan, J.* in S. A. No. 860 of 1921, the gift was invalid, as it was not open to a Moplah following Muhammadan Law to create by a deed a *tarwad* following Marumakkathayam Law and transfer property to such *tarwad* as it is opposed to the *Tagore case.* The gift cannot operate at all in favour of the donees as the primary intention of the donor was to create *tarwad* property. 11 C. 684 (P. C.) followed.

K. P. M. Menon, K. Krishna Menon and *P. Govinda Menon* for Appellant.

K. P. Ramakrishna Aiyar for Respondent.

T. S. V.

[END OF VOLUME XLIX]